DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-5001	*** CAPITAL CASE ***
Title:	Humberto Leal Garcia, aka Humberto Leal, Petitioner
	v.
	Texas
Docketed:	June 28, 2011
Linked with 11A1	
Lower Ct:	Court of Criminal Appeals of Texas
Case Nos.:	(WR-41,743-03)
Decision Date:	June 27, 2011

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jun 28 2011	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 28, 2011)
Jun 28 2011	Application (11A1) for a stay of execution of sentence of death, submitted to Justice Scalia
Jun 28 2011	Brief amicus curiae of Government of the United Mexican States filed. (Distributed)
Jul 1 2011	Supplemental brief of petitioner filed.
Jul 1 2011	Application for leave to file amicus brief filed by the United States. VIDED. (Distributed)
Jul 5 2011	Brief of respondent Texas in opposition filed.
Jul 7 2011	Application (11A1) referred to the Court.
Jul 7 2011	Application for leave to file amicus brief GRANTED.
Jul 7 2011	Application (11A1) denied by the Court. Opinion per curiam. Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor and Justice Kagan join, dissents.
Jul 14 2011	DISTRIBUTED for Conference of September 26, 2011

PETITION FOR WRIT OF CERTIORARI

No. 11-____

IN THE

Supreme Court of the United States

HUMBERTO LEAL GARCIA,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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THIS IS A CAPITAL CASE. MR. LEAL IS SCHEDULED TO BE EXECUTED JULY 7, 2011

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), the International Court of Justice determined that Humberto Leal Garcia and fifty other Mexican nationals under sentence of death in the United States were entitled to receive judicial review and reconsideration of their convictions and sentences in light of the violation of their rights under the Vienna Convention on Consular Relations. In *Medellin v. Texas*, 552 U.S. 491 (2008), this Court held that the United States is bound under Article 94(1) of the United Nations Charter to comply with the *Avena* Judgment and settled the procedures by which, as a matter of U.S. constitutional law, the international obligation to comply may be given domestic effect. Specifically, this Court held that neither it nor the President had the authority to execute the international obligation, which instead lies with the Congress.

In response to that ruling, the U.S. Government has worked closely with Congressional leaders to introduce legislation that would fully implement the United States' international legal obligations while remaining faithful to this Court's jurisprudence regarding the application of the Vienna Convention on Consular Relations in domestic courts. On June 14, 2011, legislation was introduced in the Senate with the full support of the U.S. Department of Justice, Department of State, Department of Defense, and Department of Homeland Security. Nonetheless, the State of Texas intends to execute Mr. Leal on July 7, 2011 before Congress has had a reasonable opportunity to exercise its constitutional prerogative to determine compliance.

This case presents the following questions:

1. Whether Mr. Leal's Fifth and Fourteenth Amendment rights not to be deprived of his life without due process of law entitle him to remain alive until Congress has had a reasonable opportunity to exercise its constitutional prerogative to implement the right to judicial review and reconsideration under *Avena and Other Mexican Nationals*, so that he can secure access to a remedy to which he is entitled by virtue of a binding international legal obligation of the United States; and

2. Whether the Court should grant a writ of habeas corpus to adjudicate Mr. Leal's claim on the merits, where he seeks relief pursuant to a binding international legal obligation that the federal political branches seek to implement, and where adequate relief cannot be obtained in any other form or from any other court.

PARTIES

All parties to the proceedings below are named in the caption of the case.

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas was issued on June 27, 2011. *See* A397. The Court held that Mr. Leal's Second Subsequent Application for Post-Conviction Writ of Habeas Corpus was barred under Tex. Code Crim. P. Art. 11.071, §5. Three judges concurred in the result, but urged the Texas Board of Pardons and Paroles and Governor Rick Perry to exercise their powers to grant a reprieve. A404.

JURISDICTION

The final judgment of the Court of Criminal Appeals of Texas, that state's court of last resort in criminal matters, issued on June 27, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions, which are reproduced beginning at page A31 in the Appendix:

1. United States Constitution, Amend. V;
2. United States Constitution, Amend. XIV;
3. United States Constitution, art. VI, cl. 2;
4. All Writs Act, 28 U.S.C. §1651(a);
5. United Nations Charter, art. 94(1), 59 Stat. 1031 (opened for signature June 26, 1945) (the "UN Charter");

6. Statute of the International Court of Justice, arts. 36(1), 59-60, 59 Stat. 1031 (opened for signature June 26, 1945) (the "ICJ Statute");

7. Texas Code of Criminal Procedure, art. 11.071, § 5(a), (d)-(e).

STATEMENT OF THE CASE

A. *Avena*, The Presidential Determination, and *Medellin v. Texas*

In the *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31) ("*Avena*"), the International Court of Justice ("ICJ") determined that the United States had violated the rights of Mr. Leal and fifty other Mexican nationals under sentence of death in the United States to consular notification and access under the Vienna Convention on Consular Relations. As a remedy for those violations, the ICJ determined that each national was entitled to judicial review and reconsideration of his conviction and sentence to determine whether the consular rights violation resulted in actual prejudice.

On February 28, 2005, President George W. Bush issued a written determination that the United States had a binding obligation under international law to comply with *Avena*. Br. for U.S. as Amicus Curiae Supporting Resp't at App. 2, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). He also determined that, to achieve compliance, state courts should provide review and reconsideration to the fifty-one Mexican nationals named in the *Avena* Judgment, including Mr. Leal, pursuant to the criteria set forth by the ICJ, notwithstanding any state procedural rules that might otherwise bar review of the claim on the merits.

In *Medellin v. Texas*, 552 U.S. 491 (2008), the Court held that under Article 94(1) of the United Nations Charter, a valid treaty of the United States, the United States has a binding international obligation to comply with *Avena* by providing review and reconsideration to the Mexican nationals subject to that judgment. Specifically, the Court observed that "no one disputes" that the obligation to abide by the *Avena* judgment, which "flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States." *Id.* at 504 (emphasis in original). The Court also expressly noted its agreement with the President as to the importance of United States' compliance with that obligation. *Id.* at 524.

The Court held, however, that that international obligation had not yet been validly executed as a matter of U.S. domestic law. *First*, courts are not empowered to automatically enforce ICJ decisions as domestic law because the "sensitive foreign policy decisions" of whether and how to comply are reserved for the political branches. *Id.* at 511. *Second*, the "array of political and diplomatic means available [to the President] to enforce international obligations" does not include the power to "unilaterally convert[] a non-self-executing treaty into a self-executing one." *Id.* at 525. Hence, "while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions." *Id.* at 522-23. Instead, an additional step by the political branches is necessary, including action by Congress to pass implementing

legislation, *id.* at 527, or by the President "by some other means, so long as they are consistent with the Constitution," *id.* at 530.

Concurring in the judgment, Justice Stevens also noted that the United States' international obligation to provide review and reconsideration under the *Avena* Judgment was undisputed. *Id.* at 536. He urged action by Texas to "shoulder the primary responsibility for protecting the honor and integrity of the Nation," *id.*, particularly where "the costs of refusing to respect the ICJ's judgment are significant," *id.* at 537.

Justice Breyer, joined by Justices Souter and Ginsburg, dissented, stating that the Supremacy Clause of the U.S. Constitution required that the state courts comply with *Avena*, since "the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ's jurisdiction, bind[s] the courts no less than would 'an act of the [federal] legislature.'" *Id.* at 538-39 (internal cites omitted). Like the majority, Justice Breyer recognized that noncompliance would exact a heavy toll on the United States. *Id.* at 565-66.

Mr. Medellin was executed on August 5, 2008. Prior to his execution, he sought a stay of execution from this Court on the grounds that legislation had recently been introduced in the House of Representatives to enforce the *Avena* judgment. Brief for Petitioner, *Medellin v. Texas*, 554 U.S. 759 (2008) (No. 08-5573). The Court denied the stay, noting that the Government had provided no assurances that legislation would be adopted, and had refrained from providing its views on the matter. *Medellin v. Texas*, 554 U.S. 759 759-60 (2008). Four justices would have granted the stay in order to request the views of the Solicitor General. *Id.* at 761-63, 765.

B. Subsequent Proceedings Before the International Court of Justice

On June 5, 2008, Mexico instituted new proceedings in the International Court of Justice by filing a Request for Interpretation of the *Avena* Judgment. *See* Application Instituting Proceedings, Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), June 5, 2008.[1] The ICJ held oral proceedings on June 19 and 20, 2008. At argument, the Legal Adviser to the Secretary of State confirmed "that the United States takes its international law obligation to comply with the Avena Judgment seriously" and agreed that *Avena* requires the provision of review and reconsideration prior to the imposition of any death sentence. *See* A133; A134; A136; A184.

On January 19, 2009, the Court issued its judgment. Although it refrained from issuing a reinterpretation of *Avena*, it held that the United States had violated its international legal obligations by executing José Medellín on August 5, 2008. *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2009 I.C.J. 139, ¶ 53. It declared that the United States' commitments under *Avena* "must be met within a reasonable period of time," and noted that the United States "has insisted that it fully accepts" this obligation. Id. ¶ 28. Meanwhile, the Court emphasized that "the obligation upon the United States not to

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[1] The parties' written and oral pleadings and the judgment, orders and press releases of the International Court of Justice in respect of the Request for Interpretation are available at http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=139&k=11 (last visited June 27, 2011).

execute . . . Humberto Leal Garcia . . . pending review and reconsideration being afforded to [him] is fully intact." Id. ¶ 54.

C. Congressional Action to Implement the ICJ's Judgment

Following this Court's decision in *Medellin v. Texas*, Members of the House of Representatives introduced legislation to give the *Avena* Judgment domestic legal effect. The "Avena Case Implementation Act of 2008" would have granted foreign nationals such as Mr. Leal a right to judicial review of their convictions and sentences in light of Vienna Convention violations in their cases. Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2d Sess. 2008). Introduced late in the congressional term during a presidential election year, the bill failed to pass.

In October 2009, a group of leading Senators requested the views of the Obama Administration as to whether legislation was warranted to implement the *Avena* judgment. A226, Affidavit of Katharine Huffman, ¶ 5. In April 2010, the Department of Justice and the Department of State confirmed, in separate letters, that legislation was the "optimal" means of ensuring compliance with the United States' international legal obligations under the ICJ's ruling. *Id.* at A246, App. C; A249, App. D. In response, on July 29, 2010, the Senate Appropriations Committee included legislative language to implement the *Avena* Judgment as part of the Department of State, Foreign Operations, and Related Programs Appropriation Act for Fiscal Year 2011. *Id.* at A253, App. E. The bill would have provided federal courts with jurisdiction to review the merits of Mr. Leal's Vienna Convention claim. Upon a finding of actual prejudice from the violation of Mr. Leal's

consular rights, the bill would have required the court to fashion "appropriate relief, including ordering a new trial or sentencing proceeding." S. 3676, 111th Cong. (2d Sess. 2010). In December 2010, Congress adopted a continuing resolution in lieu of an omnibus appropriations bill. As a result, the appropriations bill and all legislative initiatives attached to the bill—including the *Avena* implementing legislation—failed to pass. A227, Affidavit of Katharine Huffman, ¶ 7.

On June 14, 2011, Senator Patrick Leahy introduced the "Consular Notification Compliance Act," which would grant Mr. Leal a right to the judicial process required by *Avena*. The new legislation has the full support of the Department of Justice, the Department of State, the Department of Defense and the Department of Homeland Security—a fact that distinguishes this legislation from previous congressional efforts and greatly enhances the chances of passage. A225, Affidavit of Katharine Huffman. The proposed bill specifically authorizes federal courts

> to review the merits of a petition claiming a violation of Article 36(1)(b) or (c) of the Vienna Convention on Consular Relations, or a comparable provision of a bilateral agreement addressing consular notification and access, filed by a person convicted and sentenced to death by any federal or state court prior to the date of enactment of this Act.

A36, Consular Notification Compliance Act, § 4 (a)(1). Significantly, the legislation provides that a petition raising a violation of Article 36 shall not "be considered a second or successive habeas corpus application or subjected to any bars to relief based on pre-enactment proceedings other than as specified in paragraph (2) of this subsection." *Id.* § 4(a)(4).

D. Decision of the Inter-American Commission on Human Rights

On December 12, 2006, Mr. Leal filed a petition before the Inter-American Commission on Human Rights raising the violation of his consular rights as well as several violations of the 1948 Declaration of the Rights and Duties of Man ("American Declaration"). The Inter-American Commission is the principal human rights organ of the Organization of American States ("OAS") and is empowered to consider and evaluate the merits of human rights violations raised by individuals from any OAS member state. *See* Inter-American Commission on Human Rights, *What is the IACHR?*, *available at* http://www.cidh.oas.org/what.htm; *see also* Thomas Buergenthal, International Human Rights in a Nutshell 174, 179, 181-82 (2d ed. 1995). As a member of the OAS, the United States has recognized the Commission's competence to consider such petitions.[2]

On August 7, 2009, after reviewing the legal arguments of both parties and the facts submitted in support of Mr. Leal's claims for relief, the Inter-American Commission on Human Rights issued a report concluding, in pertinent part, that Mr. Leal was prejudiced by the violation of his rights to consular notification and assistance. Specifically, the Commission found that it was "apparent from the record before the

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[2] The United States has signed and ratified the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, as well as the Protocol of Buenos Aires that amended the OAS Charter and established the Commission as a principal organ through which the OAS would accomplish its purposes. Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. As ratified treaties of the United States, both instruments apply with equal force and supremacy to all states, including Texas. U.S. Const. art. VI, cl. 2. The amended OAS Charter specifically provided that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." OAS Charter, art. 106. Under Article 145, the Inter-American Commission is given the responsibility to "keep vigilance over the observance of human rights." *Id.* art. 145.

Commission that, following [Mr.] Leal Garcia's conviction and sentencing, consular officials were instrumental in gathering significant evidence concerning [his] character and background. This evidence, including information relating to [his] family life as well as expert psychological reports, could have had a decisive impact upon the jury's evaluation of aggravating and mitigating factors in [his] case. . . ." A50, Medellin, Ramirez Cárdenas and Leal García v. United States, Case 12.644, Inter-Am. Comm'n H.R., Report No. 90/09, OEA/Ser.L/V/II.135, doc. 37, ¶¶ 128, 131 (2009).

As to remedies, the Commission recommended that Mr. Leal's death sentence be vacated and that he be afforded "a new trial in accordance with the equality, due process and fair trial protections, prescribed under . . . the American Declaration, including the right to competent legal representation." *Id.* ¶¶ 160(1), 169(1). The Commission also reiterated that the United States is required to "take the necessary measures to preserve" Mr. Leal's life and physical integrity "pending the implementation of the Commission's recommendations in the matter." *Id.* ¶ 159. His execution under these circumstances, the Commission warned, would constitute a failure by the United States "to act in accordance with its fundamental human rights obligations as a member of the Organization of American States." *Id.* ¶ 168.

E. Denial of Federal Habeas Relief and the Filing of Mr. Leal's State Habeas Petition

On June 16, 2011—two days after the introduction of the Consular Notification Compliance Act—Mr. Leal filed a habeas petition in the U.S. District Court for the Western District of Texas, arguing that he had a due process right to remain alive while

Congress considered and passed legislation providing him the remedy to which he is entitled under *Avena*. On June 22, 2011, the court denied relief, finding that Mr. Leal's claims were foreclosed by this Court's decision in *Medellin v. Texas*. *Leal Garcia v. Thaler*, ___F.Supp. ___, 2011 WL 2479912 (W.D.Tex.) at *15.

F. The Proceedings Below

On June 23, 2011, Mr. Leal filed a Second Subsequent Application for Writ of Habeas Corpus with the Texas Court of Criminal Appeals and an application for a stay of execution.[3] Mr. Leal argued that his constitutional rights to life and due process of the law entitle him to reasonable access to a remedy of judicial process that the United States is bound as a matter of international law to provide, and that to execute Mr. Leal before the competent political actors have had a reasonable opportunity to convert the Nation's international law obligation under the *Avena* Judgment into a justiciable legal right would amount to an unconstitutional deprivation of his right to life without due process of law. In addition, Mr. Leal argued that his execution without having received the required review and reconsideration would impinge upon the constitutional authority of Congress, confirmed by this Court, to give effect to the United States' obligation under Article

[3] The Texas Court of Criminal Appeals will not entertain any petition for writ of habeas corpus while a parallel proceeding is pending in federal court. *See Ex parte Soffar*, 143 S.W.3d 804, 805-06 (Tex. Crim. App. 2004) (Texas state courts defer action on causes properly within their jurisdiction "until the courts of another sovereignty with concurrent powers, and already cognizant of litigation, have had an opportunity to pass upon the matter."). Although Mr. Leal had filed a motion to stay and abate the federal habeas corpus proceedings on June 16, 2011—the same day that he filed his federal petition for writ of habeas corpus—the federal court denied his motion. For this reason, Mr. Leal was compelled to wait until the federal court had dismissed his petition before initiating habeas corpus proceedings in the Texas courts.

94(1) of the United Nations Charter to comply with the *Avena* Judgment. Finally, Mr. Leal argued that his execution would violate his First Amendment Rights to petition Congress for redress of grievances and to free speech. In his stay application, Mr. Leal asked the Court to delay his execution to allow the competent political authorities a reasonable opportunity to implement the ICJ's judgment.[4]

On June 27, 2011, the Texas court denied relief, finding that Mr. Leal's habeas application was barred under Tex. Code Crim. P. Art. 11.071, §5. *See* A397. Three judges concurred in the result, but urged the Texas Board of Pardons and Paroles and Governor Rick Perry to exercise their powers to grant a reprieve. A404.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Mr. Leal is scheduled to be executed by lethal injection on July 7, 2011, although he has yet to receive the review and reconsideration of his conviction and sentence mandated by the *Avena* Judgment of the International Court of Justice. In *Medellin v. Texas*, 552 U.S. 491 (2008), this Court confirmed that the United States is bound as a

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[4] Mr. Leal has also filed a Petition for Clemency with the Texas Board of Pardons and Paroles, and has asked Texas Governor Rick Perry for a reprieve. Mr. Perry's views are reflected in a June 27, 2011 New York Times article:

> Mr. Perry's press secretary, Katherine Cesinger, suggested that he did not view the matter through the lens of reciprocal international obligations. 'If you commit the most heinous of crimes in Texas,' she said, 'you can expect to face the ultimate penalty under our laws, as in this case.'

Adam Liptak, *Texas is Pressed to Spare Mexican Citizen on Death Row*, June 27, 2011, *available at* http://www.nytimes.com/2011/06/28/us/28bar.html?_r=2.

matter of international law to comply with the *Avena* Judgment, and clarified that it falls to Congress to determine whether and how to give the Judgment domestic legal effect.

No one—not this Court, not the Executive, not Congress, not Texas—disputes the United States' "plainly compelling" interest in complying with the international obligation reflected in *Avena*. The Executive and Legislative branches have been continuously engaged in efforts to find an alternative and expeditious means of implementing the United States' obligations under the *Avena* Judgment. Most important, legislation has been introduced in the U.S. Senate with the full support of the Department of Justice, the Department of State, the Department of Defense, and the Department of Homeland Security. A45, 157 CONG. REC. S3779-80 (daily ed. June 14, 2011) (statement of Sen. Leahy). Leaders of the diplomatic and business communities have warned that Mr. Leal's execution could have grave consequences for Americans abroad. *Id.* at S3781-82.

Despite this extraordinary and unique set of circumstances, Texas proceeds implacably towards execution on July 7. If allowed to proceed, Texas will simultaneously deprive Mr. Leal of reasonable access to a remedy required under a binding international legal obligation and place the United States in irreparable breach of its treaty obligations. Under these unique circumstances, Mr. Leal's execution would violate his constitutionally protected right not to be deprived of his life without due process of law. And by placing the United States in irreparable breach of its treaty commitments before Congress and the federal Executive can act to compel compliance, Texas effectively will usurp the institutional prerogative of the federal political

branches—advocated by Texas in *Medellin v. Texas* and confirmed by this Court—to determine whether and how to give domestic legal effect to the treaty obligations of the Nation. This Court must not allow Texas to subvert Mr. Leal's constitutional rights and the compelling institutional interests of Congress and the Executive in a race to execution, particularly given the overwhelming public interest in achieving compliance with the *Avena* Judgment.

In view of the exceptional circumstances of this case, Mr. Leal respectfully asks that this Court either grant a writ of certiorari or hold his petition in abeyance to allow Congress a meaningful opportunity to consider and pass the Consular Notification Compliance Act. *See* All Writs Act, 28 U.S.C. §1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). In the alternative, he asks the Court to grant him a writ of habeas corpus for the purpose of preserving Congress's ability to bring the nation into compliance with the *Avena* Judgment. In addition, in connection with whichever form of relief the Court may deem appropriate to grant, Mr. Leal asks this Court to grant his motion for a stay of his execution for such time as is necessary to permit the competent political actors a reasonable opportunity to act consistent with this Court's decision in *Medellin v. Texas*.[5] Finally, Mr. Leal requests that the Court seek the views of the Solicitor General of the United States with regard to this filing.

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[5] A Motion for Stay of Execution is filed concurrently with this Petition.

I. The Court Should Grant The Writ of Certiorari In Order To Protect Mr. Leal's Due Process Rights, The Constitutional Prerogatives Of Congress, And The Foreign Policy Interests Of The United States.

A. The Court Should Grant The Writ In Order To Prevent The Irreparable Deprivation Of Mr. Leal's Life Without Due Process Of Law By Virtue Of His Execution In Violation Of An Undisputed Legal Obligation Of The United States.

This case comes to this Court in a unique but extraordinarily compelling set of circumstances. Nine Justices of this Court, the President of the United States, and, in pleadings before this Court, the State of Texas have confirmed that the United States has a binding legal obligation arising under Article 94(1) of the United Nations Charter not to execute Mr. Leal unless and until he has received the review and reconsideration ordered by the ICJ in *Avena*. The United States has reiterated its intention to comply with this obligation before the International Court of Justice and the Human Rights Council, and has devoted substantial time and effort to draft legislative language acceptable to the federal government and key members of Congress. If Texas were to proceed with the scheduled execution of Mr. Leal next Thursday, July 7, there could be no dispute that that execution would be unlawful—specifically, in violation of treaty commitments validly made by the United States through constitutionally prescribed processes.

For the past three years, Congress has been moving steadily toward the passage of legislation to implement the *Avena* Judgment. Significantly, two experts on congressional procedure believe there is a substantial likelihood that the Consular Notification Compliance Act will pass before the end of 2011. *See* A225, Affidavit of Katharine Huffman, ¶ 10; A256, Affidavit of Prof. Ross Baker, ¶ 16. As Professor Baker explains,

the time that Congress has taken to introduce legislative language should not be considered as an indication of Congress's disinterest in implementing *Avena*; the process by which bills are introduced, considered and presented for a vote is cumbersome and complex. A256, Affidavit of Prof. Ross Baker. In addition, the introduction of legislation to implement the *Avena* Judgment has required extensive consultation with several agencies of the Executive Branch,[6] and has involved difficult questions of federalism, habeas corpus procedure, and international law. Nonetheless, Members of Congress and the Executive Branch have worked diligently to promote *Avena* legislation. Significantly, the introduction of the "Consular Notification Compliance Act" marks the first time that the legislation has been introduced with the full support of all relevant departments of the Executive Branch, including the Department of State, the Department of Justice, the Department of Defense, and the Department of Homeland Security. A225, Affidavit of Katharine Huffman; A45, 157 CONG. REC. S3779-80 (daily ed. June 14, 2011) (statement of Sen. Leahy). With the Administration's vigorous support, experts believe that there is a substantial likelihood that the Consular Notification Compliance Act will pass by the end of the year. *See* A228, Affidavit of Katharine Huffman, ¶ 10; A261, Affidavit of Prof. Ross Baker, ¶ 16. There is no time, however, for committee hearings, deliberations and floor debates in both the House and Senate before Mr. Leal's scheduled execution on July 7, 2011.

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[6] A45, 157 CONG. REC. S3779-80 (daily ed. June 14, 2011) (statement of Sen. Leahy). (noting that the legislation has the full support of the Department of State, Department of Justice, Department of Defense, and Department of Homeland Security).

In these circumstances, it would violate Mr. Leal's right not to be deprived of his life without due process of law were he to be executed as scheduled on July 7. *See* U.S. Const. amends. V, XIV; *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1998) ("[a] prisoner under death sentence remains a living person and consequently has an interest in his life") (O'Connor, J., concurring); *id.* at 291 ("There is . . .no room for legitimate debate about whether a living person has a constitutionally protected interest in life.") (Stevens, J., concurring in part and dissenting in part). "[A]s [the Supreme Court has] often stated, there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

At its most basic, due process guarantees to a criminal defendant a right not to be deprived of "fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (noting "the truism that '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); *cf. Logan v. Zimmerman*, 455 U.S. 422, 429-30 (1982) (due process bars a state from denying a litigant "an opportunity to be heard upon [his] claimed [right].") (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). Applying that basic principle here, Mr. Leal cannot be executed consistent with due process if he is executed in violation of a binding legal obligation arising from a treaty voluntarily entered into by the United States to provide him additional process in the form of review and reconsideration. As a matter of

law, that additional process could change the outcome on either his conviction or sentence.[7] *See* A50, Medellin, Ramírez Cárdenas and Leal García v. United States, ¶ 128, 131 (finding prejudice as a result of the Vienna Convention violation in Mr. Leal's case); Second Subsequent Application for Writ of Habeas Corpus at Part II.b; *Leal v. Texas*, No. 11-___ (June 27, 2011) (discussing factual basis for claim of prejudice); *cf. United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("[T]he right[] . . . to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights."); *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (there is a constitutional right to "adequate, effective, and meaningful" access to process). As a matter of law, therefore, his execution would violate the most fundamental objectives of the due process clause.

That conclusion is reinforced by the character of the penalty Mr. Leal faces. *See Gardner v. Florida*, 430 U.S. 349, 357 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country.") (opinion of Stevens, J.). It is

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[7] Mr. Leal has yet to receive the requisite review and reconsideration mandated by *Avena*. State and federal courts have both found the issue to be procedurally defaulted. Although each court purported to find, in the alternative, that Mr. Leal had not been prejudiced by the consular notification violation, neither court had jurisdiction over the question or authority to grant any relief. Under the circumstances, this sort of "alternative" prejudice finding does not constitute sufficient review and reconsideration. Indeed, the ICJ rejected precisely this type of putative review by the state and federal courts in the case of José Medellín, another Mexican national whose case was adjudicated by the ICJ in *Avena*, and who was executed by the state of Texas in August 2008. In January 2009, the ICJ determined that the United States had failed to comply with its obligations to provide review and reconsideration in Medellín's case—despite Texas' contention that such "alternative" merits assessments were sufficient "review and reconsideration" under Avena. 2009 I.C.J. 139 at ¶¶ 53-54. The ICJ accordingly held that the United States had violated its international legal obligations by executing Medellín without providing him the requisite review and reconsideration. *Id.*

thus "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358; *see also Barefoot v. Estelle*, 463 U.S. 880, 888 (1983) ("[A] death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding."). To carry out a sentence of death when an undisputed legal obligation, albeit one not yet effective on the domestic level, remains unfulfilled would be antithetical to the very notion of lawful process.

While the circumstances of this case may be unique, those circumstances all militate in favor of recognizing a right to relief here. *First*, it is no answer to the request for relief that Mr. Leal's entitlement to review and reconsideration has not yet been realized as a matter of U.S. domestic law. After all, the treaty-making processes by which the United States undertook the obligation have constitutional significance. Under the plain and unambiguous terms of the Supremacy Clause, "treaties made . . . under the authority of the United States [are] the supreme law of the land." U.S. Const. art. VI, cl. 2; *see also Medellin v. Texas*, 552 U.S. at 510 ("If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause."). Unless the Court means to write the plain and unambiguous language of the Supremacy Clause out of the Constitution, the treaty relevant here—Article 94(1) of the United Nations Charter—must be taken into account as part of the due process analysis, even if it has not yet been executed as a matter of U.S. law. It remains, as the Supremacy Clause tells us,

an exercise of the constitutional authority of the President and Senate and, as such, part of the supreme law of the land.

And it is precisely this previous exercise of constitutional treaty-making authority--now manifest in the undisputed international legal obligation to provide review and reconsideration—that distinguishes Mr. Leal from an individual who merely awaits, with no guarantee of success, a prospective conferral of rights by the legislative process. To be sure, there can be no due process violation of a right Congress has not yet created. But that is not the case here. The constitutionally designated house of Congress has *already acted*, when the Senate advised on and consented to the Optional Protocol to the Vienna Convention and the UN Charter and the President thereby ratified them. By the action of the President and the Senate, the constitutionally designated political branches, the treaty obligation to provide review and reconsideration *already exists*, as a matter of international law. And the constitutionally designated domestic lawmaking branches have *already begun to act* to convert that international law obligation into a domestic right. In these circumstances, Mr. Leal indisputably has a right to remain alive until he can vindicate the right to the relief contemplated by this country's treaty commitment.

Second, it is no answer to the request for relief that it is uncertain whether Congress will enact legislation to execute the treaty obligation to comply with *Avena*. In *Medellin v. Texas*, 554 U.S. 759, 759-60 (2008), this Court denied the petitioner's motion for stay of execution on the grounds that the prospects for legislative relief were too speculative, noting that "neither the President nor the Governor of the State of Texas

ha[d] represented...that there [wa]s any likelihood of congressional or state legislative action." The Government's full endorsement of the Consular Notification Compliance Act distinguishes this case from *Medellin*, where legislation had been introduced in the House of Representatives that the Government did not support. To be sure, this Court has construed Article 94(1) to preserve to Congress the "option of noncompliance," *Medellin v. Texas*, 552 U.S. at 511, and even had the Court held Article 94(1) to be self-executing with respect to the judicial right at issue here, Congress would have retained, by virtue of the last-in-time rule, the authority to legislate a breach of the treaty. *See, e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Head Money Cases (Edye v. Robertson)*,112 U.S. 580, 598-99 (1884). But this Court has long instructed that, as a matter of law, it should decide cases on the presumption that Congress intends the United States to comply with the treaty commitments it makes. *Cf. Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (in the absence of clear instruction from Congress, courts should not construe statutes in a manner that would place the United States in breach of its treaty obligations). Any other approach would be an insult to the constitutionally designated treaty-makers: the President, in negotiating a treaty, and the Senate, in providing its advice and consent, would fulfill those roles under a cloud.

Here, the presumption that the United States will do what it promises to do is reinforced by the Executive Branch's unequivocal determination that the United States should do just that. *See* Br. for the United States as Amicus Curiae Supporting Petitioner at 8-9, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984); Br. for the United States as Amicus

Curiae Supporting Respondent at 43, 45, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928) (President has determined it is in the "paramount interest of the United States" to achieve "prompt compliance with the ICJ's decision with respect to the 51 named individuals"). The President is the sole organ of the United States in conducting its foreign affairs. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). While this Court has held that the Executive Branch does not have the constitutional or statutory authority to execute the Article 94(1) obligation here, its views on compliance are entitled to respect in this Court, and they surely will carry weight in the Congress, as will this Court's endorsement of those views. *See Medellin v. Texas*, 552 U.S. at 513-14, 524 ("United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law . . . are plainly compelling").

Third, it is no answer to the request for relief that Congress has not yet acted. Until this Court issued its decision in *Medellin v. Texas*, there was simply no reason for Congress to believe it needed to act. Indeed, one of the indicia of a self-executing treaty is the failure of Congress to take up the question of implementation. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters' notes 5 ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by courts."). It was not until April 2010 that the Executive Branch indicated to Congress the need for legislation to implement the *Avena* Judgment. A246, App. C; A249, App. D.

Three months after receiving that confirmation, legislative language was introduced in the Senate as part of the Omnibus Appropriations bill. A227, Affidavit of Katherine Huffman, ¶ 7. That legislation came very close to passage before Congress decided to adopt a "continuing resolution" in lieu of an appropriations bill. *Id.* Now, early in the 2011-12 Congressional term, legislation has already been introduced with the Government's full and public support. *Id.* at ¶ 8. In sum, the fact that legislation has not yet passed since this Court's decision in *Medellin* cannot be taken as Congressional indifference, much less Congressional opposition: the previous bills have not come up for a floor vote, and as Professor Baker points out, very few pieces of legislation are introduced and passed in one Congressional term. A256, ¶¶ 2, 13.

B. The Court Should Grant The Writ, Or, In The Alternative, Hold the Petition in Abeyance In Order To Preserve The Constitutional Prerogative Of Congress To Determine Compliance With The United States' Obligation Under Article 94(1).

In *Medellin v. Texas*, this Court held that it was up to Congress to determine whether the United States would comply with its commitment under Article 94(1) of the United Nations Charter to comply with *Avena*. 552 U.S. at 508, 515 (2008). In settling the constitutional process for enforcement of Article 94(1), this Court confirmed that a treaty is "'equivalent to an act of the legislature,'" and self-executing when it "'operates of itself without the aid of any legislative provision.'" *Id.* at 505 (quoting *Foster v. Nelson*, 26 U.S. (2 Pet.) 253, 315 (1829) (Marshall, C.J.), overruled on other grounds, *United States v. Percheman*, 26 U.S. (7 Pet.) 51 (1833)). However, the Court explained, some treaties are not fully realized at the time ratified, and in those cases, Congress must

take further action to execute the treaty by enacting implementing legislation. *Medellin v. Texas*, 552 U.S. at 504-05 (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). Thus, in those cases, Congress retains the option to choose not to comply—"always regarded as an option by the political branches." *Medellin v. Texas*, 552 U.S. at 511. This Court noted that it would be "particularly anomalous" to leave Congress without that choice, "in light of the principle that 'the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative –'the political' – Departments.'" *Id.* (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

In holding that it was up to Congress to determine the question of compliance with *Avena*, the Court vindicated the position of Texas and several of its amici states. For example, in *Medellin v. Dretke*, Texas took it for granted that the United States would comply with *Avena*, but emphasized the importance of allowing the federal political branches to determine how:

> It is beyond cavil that . . . America should keep her word. But the choice of how to do so, and how to respond to alleged treaty violations, is left to the political branches of government. . . . The President and Congress could seek to pass legislation addressing the *Avena* decision[.]

Respondent's Br. at 7, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). Again, in *Medellin v. Texas*, Texas stated: "To be sure, Texas recognizes the existence of an international obligation to comply with the United States' treaty commitments, including, as appropriate, through changes to domestic law." Respondent's Br. at 12, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984). Nearly half the states supported that position in this Court and the Texas Court of Criminal Appeals. *See* Br. of the States of Alabama,

Montana, Nevada and New Mexico as Amici Curiae in Support of Respondent at 16 n.8, *Ex parte José Ernesto Medellin*, 223 S.W.3d 315 (No. AP-75,207) ("the proper way to render the ICJ's judgment binding on the state courts would be by an Act of Congress"); Br. for the States of Alabama et al., as Amici Curiae, in Support of Respondent at 17-18, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928) ("As a delicate matter of foreign policy, [the] task [of choosing how to comply with *Avena*] should be left to the Executive Branch and Congress, at least in the first instance.").

Having determined that Congress has the authority to determine compliance with *Avena*, this Court should ensure that it has the opportunity to do so. The Court interpreted the scheme of Article 94 of the United Nations Charter to preserve to the political branches the "option of noncompliance"—specifically, their ability "to determine whether and how to comply with an ICJ judgment." *Medellin v. Texas*, 552 U.S. at 511. It need hardly be said that, if the option of noncompliance must be preserved for decision by the political branches, so too should the option of compliance.

Yet Texas's rush to execute Mr. Leal threatens to deprive the political branches of the very decision the Court reserved to them. There can be no dispute that, if Texas executes Mr. Leal without providing review and reconsideration in accord with *Avena*, it will cause the United States to breach a treaty obligation that, in light of the Court's decision that the obligation was non-self-executing, Congress has already begun to take steps to execute, that Congress has to this date given no indication that it wishes the United States to breach, and with which the Executive Branch has taken vigorous steps to bring about compliance. That result would turn the constitutional design set out by this

Court in *Medellin v. Texas* on its head, and, at the same time, indulge the most cynical view of the United States' intentions when, by the considered actions of its President and Senate, it enters into bilateral or multilateral treaty commitments with other nations.

C. The Court Should Grant The Writ In Order To Preserve The United States' Credibility In International Affairs Generally And In Its Treaty-making Activity Specifically.

The point has been made so many times during the course of this and related cases that it is important not to become inured to its significance: by constitutionally prescribed processes, by constitutionally designated actors, acting on behalf of the American people as a whole, the United States promised the international community that it would abide by judgments of the ICJ in cases in which it was a party. U.N. Charter, art. 94(1); Statute of the International Court of Justice, art. 59. The United States fully participated in the proceedings that led to the *Avena* judgment, and both Republican and Democratic Administrations have told the world that the United States must and will comply. Yet Texas, by insisting on executing Mr. Leal before Congress has had a chance to act, seeks to break the United States' promise. The damage that would be done to the United States' credibility in world affairs if Texas were permitted to do so would be incalculable. And by placing in doubt the United States' ability to comply with these treaty commitments, the decision would compromise the ability of United States consular officials and citizens to rely on the important protections embodied in the Vienna Convention.

In its amicus brief submitted in *Medellin v. Texas*, the United States advised this Court of the critical interests at stake in this matter. The United States cited two principal foreign policy considerations prompting former President George W. Bush's 2005 decision to direct state courts to provide review and reconsideration: "the need for the United States to be able to protect Americans abroad" and the need to "resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government." Br. for the United States as Amicus Curiae Supporting Respondent at 43, 45, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). In light of these objectives, the President considered it in the "paramount interest of the United States" to achieve "prompt compliance with the ICJ's decision with respect to the 51 named individuals" including Mr. Leal. *Id.* at 41; *see also* Br. for the United States as Amicus Curiae Supporting Petitioner 8-9, *Medellin v. Texas*, 522 U.S. 491 (No.06-984).

Every Member of this Court recognized that there is a vital public interest in achieving compliance with the United States' obligations under the *Avena* Judgment. Writing for the majority, Chief Justice Roberts noted that

> In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.

Medellin v. Texas, 552 U.S. at 524. Concurring in the judgment, Justice Stevens agreed that "the costs of refusing to respect the ICJ's judgment are significant." *Id.* at 537. And Justice Breyer, joined by Justices Souter and Ginsburg, observed in his dissenting opinion

that noncompliance with the *Avena* Judgment would exact a heavy toll on the United States by "increas[ing] the likelihood of Security Council *Avena* enforcement proceedings, worsening relations with our neighbor Mexico, precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach." *Id.* at 566.

In letters submitted to Governor Rick Perry calling for a stay of execution in Mr. Leal's case, retired military leaders, diplomats and groups representing the interests of the American expatriate community have cautioned that non-compliance with the nation's treaty obligations would jeopardize the welfare of countless soldiers and other ordinary Americans traveling abroad. A group of retired military leaders has appealed to the Texas Board of Pardons to stay Mr. Leal's execution, noting, "[a]s retired military leaders, we understand that the preservation of consular access protections is especially important for U.S. military personnel, who when serving our country overseas are at greater risk of being arrested by a foreign government." A264, Letter from Retired Military Leaders (June 6, 2011). A bipartisan group of former diplomats has echoed the need for legislation and a stay of execution, citing the risk to Americans abroad:

> Clearly, the safety and well-being of Americans abroad is endangered by the United States maintaining the double standard of protesting denials of consular notification and access to its own citizens while simultaneously failing to comply with its obligation to remedy identical violations. We cannot realistically expect other nations to continue to comply with consular treaty commitments that we refuse to uphold.

A267, Letter from Former Diplomats (June 6, 2011). An additional letter of support from former prosecutors and judges observes that "[d]elaying the execution of Humberto Leal Garcia to ensure full opportunity for congressional action and appropriate review of the case will demonstrate to foreign governments the United States' good faith in upholding its consular access obligations, increasing the likelihood that foreign governments will grant access to Americans in their custody." A270, Letter from Former Prosecutors and Judges (June 6, 2011).

Americans who have a direct stake in compliance with the Vienna Convention have also called for a stay of Mr. Leal's execution and for the passage of legislation. Billy Hayes, whose terrifying experience in a Turkish prison gave rise to the book and film, "Midnight Express," has stated that U.S. consular assistance was critical to his ability to obtain legal counsel. In a letter to the Texas Board of Pardons and Paroles, he highlights the vulnerability of Americans detained overseas, and asks the Board to grant a reprieve so that Congress can address "this vitally important concern." A272, Letter from Billy Hayes (May 27, 2011). Euna Lee, a journalist who was detained in North Korea, describes the "unbearable" "sense of darkness" she experienced while in North Korean custody. A274, Letter from Euna Lee (June 3, 2011). She states that it is "hard to describe in words" the significance of her first consular visit. *Id.* "For every endangered American hidden in a foreign prison—and for their fearful families back at home—there can be no more important priority than upholding the reciprocal right to consular protection." *Id. See also* Euna Lee, *Consular Access: A Two Way Street on a Crucial Right*, THE WASHINGTON POST, June 24, 2011, *available at*

http://www.washingtonpost.com/opinions/consular-access-a-two-way-street-on-a-crucial-right/2011/06/22/AGYkPdjH_print.html. Finally, a coalition of organizations that represent the concerns of the countless American citizens who live overseas has joined in the call to stop Mr. Leal's execution, noting that "[i]nternational compliance with these provisions is essential to the protection of the United States' vast overseas population: thousands of our fellow-citizens are held in foreign custody each year, while many thousands more rely on access to U.S. consular support after natural disasters, civil unrest or other emergencies." A276, Letter from Organizations Representing Americans Abroad (June 13, 2011); *see also* Br. of Former U.S. Diplomats as Amici Curiae in Support of Petitioner at 5, 28, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984); Br. of Former U.S. Diplomats as Amici Curiae in Support of Petitioner at 5, 26, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928). The importance to the United States' treaty partners of its compliance with its treaty obligations is dramatically illustrated here by the submission in 2007 of amicus briefs from *sixty countries* urging compliance in *Medellin v. Texas*. *See* Br. of Amici Curiae the European Union and Members of the Int'l Community in Support of Petitioner, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984) (forty-seven nations and the European Union); Br. Amicus Curiae of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellin, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984) (Mexico); Br. of Foreign Sovereigns as Amici Curiae in Support of Petitioner José Ernesto Medellin, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984) (twelve nations).

From a perspective even closer to the ground, there can be no doubt, moreover, that the consular rights afforded by the Vienna Convention are critical to the safety and security of Americans who travel, live and work abroad: tourists, business travelers, expatriates, foreign exchange students, members of the military, missionaries, Peace Corp volunteers, U.S. diplomats, and countless others. Timely access to consular assistance is crucially important whenever individuals face detention or prosecution under a foreign and often unfamiliar legal system. The United States thus insists that other countries grant Americans the right to prompt consular access.[8] For example, in 2001, when a U.S. Navy spy plane made an emergency landing in Chinese territory after colliding with a Chinese jet, the State Department cited the Vienna Convention in demanding immediate consular visits to the plane's crew. *See* Press Briefing, U.S. DEP'T STATE (Apr. 2, 2001), *available at* http://2001-2009.state.gov/r/pa/prs/dpb/2001/1889.htm. Chinese authorities granted consular visits to the crew members, who were detained in China for eleven days. During the tense standoff, the U.S. Ambassador to China emphasized that these rights of immediate and unobstructed consular access to detained American citizens are "the norms of international law," *China Grants U.S. Access to Spy Plane Crew*, CNN, Apr. 3, 2001, *available at*

[8] U.S. consulates provide arrested Americans with a list of qualified local attorneys, explain local legal procedures and the rights accorded to the accused, ensure contact with family and friends, protest any discriminatory or abusive treatment, and monitor their well-being throughout their incarceration. *See* U.S. DEP'T STATE, Assistance to U.S. Citizens Arrested Abroad, TRAVEL.STATE.GOV, http://studentsabroad.state.gov/emergencies/arrestedabroad.php (last visited June 20, 2011).

http://archives.cnn.com/2001/WORLD/asiapcf/east/04/03/china.aircollision, while the President warned that the failure of the Chinese government "to react promptly to our request is inconsistent with standard diplomatic practice, and with the expressed desire of both our countries for better relations[,]" Statement by the President on American Plane and Crew in China, The White House (Apr. 2, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/04/20010402-2.html.

The case of three young Americans detained in Iran provides a more recent illustration of the vital importance of consular assistance to Americans detained abroad. On July 31, 2009, Iranian security forces detained the three Americans after they crossed an unmarked border into Iran while on a hiking vacation in northern Iraq. On August 10, 2009, the U.S. Department of State reminded Iran "of its responsibilities under the Vienna Convention on Consular Relations, which is to provide consular access to people that have been detained in what we would call without delay." Press Briefing, U.S. DEP'T STATE (Aug. 10, 2009), *available at* http://www.state.gov/r/pa/prs/dpb/2009/aug/127094.htm. On August 15, the Secretary of State further called on the Iranian government "to live up to its obligations under the Vienna Convention...by granting consular access and releasing these three young Americans without further delay." U.S. Secretary of State, *Missing and Detained Americans in Iran*, Aug. 15, 2009, *available at* http://www.state.gov/secretary/rm/2009a/08/127948.htm. After consular access was finally granted on September 29, 2009, one of the Americans was released and Swiss authorities were able to monitor the judicial proceedings. *See* Press Briefing, U.S. DEP'T

STATE (Sept. 16, 2010), *available at* http://www.state.gov/r/pa/prs/dpb/2010/09/147268.htm; Press Briefing, U.S. DEP'T STATE (May 10, 2011), *available at* http://www.state.gov/r/pa/prs/dpb/2011/05/162971.htm. The United States has repeatedly protested Iran's failure to grant consular officers more frequent access to the detained Americans. Press Briefing, U.S. DEP'T STATE (June 21, 2011), *available at* http://www.state.gov/r/pa/prs/dpb/2011/06/166680.htm#IRAN. And in October 2009, the United States Senate and House of Representatives passed concurrent resolutions calling upon Iran to grant the hikers consular access. S. Con. Res. 45, 111th Cong. (2009) (enacted). In response to criticism over its handling of the case, the Iranian government has accused the United States of violating the Vienna Convention in the cases of Iranians detained in the United States.[9]

The business community has likewise expressed grave concern about the prospect of noncompliance with the *Avena* Judgment. In a letter to Secretary of State Hillary Rodham Clinton urging Congress to pass legislation implementing *Avena*, Peter M. Robinson, President and CEO of the United States Council for International Business observed that

> The security of Americans doing business abroad is clearly and directly at risk by U.S. noncompliance with its obligations under the Vienna Convention. As recent history has shown, American citizens abroad are at times

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[9] Fars News Agency, *Spokesman: Iran to Try 3 US Nationals Soon*, Jan. 13, 2010, *available at* http://english.farsnews.com/newstext.php?nn=8810221286 (referring to five Iranians detained by U.S. forces in northern Iraq in 2007).

> detained by oppressive or undemocratic regimes, and access to the American consular officers may be their lifeline. Overseas employees of the U.S. business community as well as all other Americans traveling or living abroad need this vital safety net. As it stands now, U.S. citizens abroad are at grave risk that other countries may not honor their reciprocal obligation.

A263, Letter from Peter M. Robinson (November 16, 2009).

Key international observers have likewise emphasized the importance to the United States of achieving compliance with *Avena*. Professor Phillip Alston, the former United Nations Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, has singled out the lack of compliance with the *Avena* Judgment as an issue of particular concern:

> The provision of consular rights seems to be treated as an issue affecting only those foreign nationals currently on death row in Texas. But precisely the same issue applies to any American who travels to another country. One legislator with whom I spoke noted that when he travels overseas he is hugely reassured by the fact that he would have the right of access to the US consulate if he was arrested. The present refusal by Texas to provide review undermines the role of the US in the international system, and threatens the reciprocity between states with respect to the rights of each others' nationals.

Press Statement, Professor Philip Alston, United Nations Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (June 30, 2008), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8815&LangID=E. Professor Alston further noted that noncompliance with *Avena* threatens to undermine other treaty regimes involving such varied subjects as trade, investment and

the environment. "Why," he queried, "would foreign corporations, relying in part upon treaty protections, invest in a state such as Alabama or Texas if they risked being told that the treaty bound only the US government but was meaningless at the state level? This is where the *Medellin* standoff leaves things." *Id.*

In short, failure to provide the modest remedy of review and reconsideration of Mr. Leal's case will jeopardize the "reciprocal rights and safety of [our] overseas citizens." A266, Letter from Former Diplomats (June 6, 2011). Those consequences will be suffered not only by Texas, but by the Nation. As James Madison emphasized at the Constitutional Convention, "[a] rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., rev. ed. 1996). Yet Texas's action threatens to cause irreparable damage to the United States' bilateral relations with Mexico, as Ambassador Arturo Sarukhan made clear in a letter addressed to the Legal Adviser to Secretary Hilary Clinton on July 11, 2010:

> [T]he Government of Mexico is profoundly concerned that setting an execution date for Mr. Garcia-Leal in the coming months could have a very detrimental effect on our bilateral relationship and on public support for policies that Presidents Calderon and Obama recently agreed to implement in order to deepen the bilateral relationship and more importantly, to provide it with a strategic footing. As a result, the unprecedented level of cooperation that both Leaders committed to continue fostering in priority areas such as the fight against transnational organized crime and drug-trafficking; judicial assistance; extraditions of high profile criminals and drug kingpins; and their renovated commitment to developing a secure and competitive 21st Century Border could be potentially jeopardized.

A283, Letter from Ambassador Arturo Sarukhan to the Honorable Harold Hongju Koh (July 11, 2010).

If denying Mr. Leal the review and reconsideration of his conviction and sentence ordered by the ICJ is so important as possibly to justify the serious harm to U.S. interests identified by the President, this Court, and many, many others that would follow from that treaty breach, that judgment should be made by the U.S. Congress, not Texas. The United States' word should not be so carelessly broken, nor its standing in the international community so needlessly compromised. In order to vindicate the constitutional allocation of authority to determine compliance with *Avena* that the Court identified in *Medellin v. Texas*, and to allow the competent political actors to comply with this country's international commitments, this Court should grant the writ and stay the execution.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari or, in the alternative, hold this petition in abeyance to allow Congress a meaningful opportunity to consider and pass legislation that implements the Nation's obligations under *Avena and Other Mexican Nationals*. The Court should also stay the execution of Mr. Leal to allow the competent political actors a reasonable opportunity to implement the international law obligations of the United States as reflected in the Judgment of the International Court of Justice.

Respectfully submitted,

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June 27, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that I am counsel in this matter for Humberto Leal García; that on this day, June 27, 2011, I caused the foregoing **Petition for Writ of Certiorari** to be served electronically on opposing counsel via e-mail delivery to:

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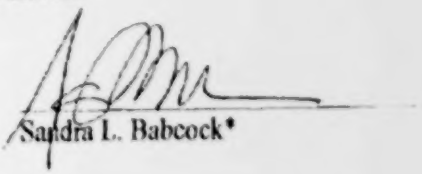
and that all parties required to be served have been served.



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OPPOSITION BRIEF

CAPITAL CASE

JUL - 7 2011

EXECUTION DATE

Supreme Court, U.S.
FILED
JUL - 5 2011
OFFICE OF THE CLERK

Nos. 11-5001 & 11A1

IN THE
SUPREME COURT OF THE UNITED STATES

HUMBERTO LEAL,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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QUESTION PRESENTED

Whether the state court's disposition, which relied upon an adequate and independent state procedural ground, forecloses certiorari review and a stay of execution?

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI AND
APPLICATION FOR STAY OF EXECUTION

Petitioner Humberto Leal[1] is a Texas death-sentenced inmate scheduled to be executed after 6:00 p.m., Thursday, July 7, 2011, for killing Adria Sauceda while in the course of committing or attempting to commit kidnaping or aggravated sexual assault. As noted by the district court, Adria Sauceda has now been dead for more years than she was allowed to live before Leal took her life. Since his conviction sixteen long years ago, Leal has filed a direct appeal to the Texas Court of Criminal Appeals, three state habeas applications, three federal habeas petitions, seven petitions for certiorari to review this Court, four appeals to the Fifth Circuit, a Chapter 64 proceeding in state court seeking to compel access to further DNA testing, a Section 1983 lawsuit in federal court, and a lawsuit in state court under the Texas Administrative Procedure Act (APA) challenging the Texas lethal-injection protocol.[2] Furthermore, since his execution date was set in November 2010, Leal has alone filed numerous

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[1] Petitioner refers to himself as "Humberto Leal Garcia" on the title page of his pleadings. Yet, Petitioner was convicted as "Humberto Leal" and has generally been referred to as "Leal" throughout the legal proceedings associated with his conviction and death sentence. For the sake of consistency, the State will continue to use the latter appellation. Respondent State of Texas is referred to herein as "the State."

[2] This does not even include Leal's extensive proceedings in the international courts.

motions and pleadings in his Section 1983 suit, an appeal of that lawsuit, a Rule 60(b) motion seeking to reopen his second federal petition, an appeal of his APA suit to the Texas Supreme Court, a third federal habeas petition, an appeal of the Fifth Circuit's dismissal of that petition, and a petition for an original writ of habeas corpus—all in addition to the instant petition for certiorari. In fact, Leal's myriad lawsuits prompted the judge in the federal district court to observe that Leal's case "has already become one of the most procedurally convoluted and complex habeas corpus proceedings ever reviewed by the undersigned." *Leal v. Thaler*, No. SA-07-CA-214-OG (W.D. Tex. Tex. Dec. 17, 2007) (DE[3] 28 at 23 ("Order Denying Rule 60(b) Motion, Motion for Stay, Etc.")). At this point, it is clear that Leal is attempting to avoid execution by overwhelming the State and the courts with as many meritless lawsuits and motions as humanly possible.

In the instant appeal, just two weeks before his execution, Leal belatedly filed a successive application for a writ of habeas corpus in state court alleging Leal is entitled to review of his capital-murder conviction pursuant to the

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[3] "DE" refers to entries on the district court's electronic docket sheet, available on PACER and followed by number. "R" refers to the record on appeal from the dismissal of Leal's second federal habeas petition. "CR" refers to the transcript of documents filed with the clerk during Leal's trial. "RR" refers to the reporter's record of transcribed trial proceedings. "SX" refers to the State's exhibits at trial. "SHCR-01, -02, -03" refers to the transcripts of documents on file with the with the clerk Leal's respective state habeas proceedings. All references are preceded by volume number and followed by page number where applicable.

provisions of the International Court of Justice's (ICJ) *Avena*[4] decision by virtue of the recent filing in the United States Senate of proposed legislation, i.e., the Consular Notification Compliance Act. The Court of Criminal Appeals properly dismissed Leal's state habeas application as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071, §5(a). Now, just nine days before his scheduled execution, Leal seeks review of the Texas Court of Criminal Appeals's decision and moves for a stay of execution.

But certiorari review is foreclosed in this case because the state court's disposition of Leal's claim relied upon an adequate and independent state procedural ground pursuant to this Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008) (*Medellín II*). And any stay of execution is foreclosed by the Court's subsequent opinion in *Medellín v. Texas*, 554 U.S. 759 (2008) (*Medellín III*). In *Medellín III*, the petitioner also argued that a stay was warranted on the theory that either Congress or the Texas Legislature might enact legislation to provide that violation of the Vienna Convention on Consular Relations was possible grounds for vacating a death sentence. But in a 5-4, per curiam opinion the Court determined that "under settled principles, these possibilities are too

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[4] *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.A.)*, (*Mex. v. U.S.A.)*, No. 128, 2004 I.C.J. 12, 2004 WL 2450913 (Mar. 31, 2004).

remote to justify an order from this Court staying the sentence imposed by the Texas courts." *Id.*

In its *Medellín III* opinion, the Court noted that the Department of Justice of the United States had not provided its opinion on the viability of the pending legislation. *Id.* In the case-at-bar, the Solicitor General has filed a brief and expressed optimism that the legislation proposed by Senator Leahy will successfully become law. But the Court noted with displeasure in *Medellín III* that no less than four years had passed since the ICJ ruling and four months since the Court's original ruling in *Medellín II*. At this point, no less than *seven* years have passed since the ICJ ruling and *thirty-five* months have passed since the Court's original ruling in *Medellín II*. Indeed, the very Congress that Medellín had hoped would pass legislation to implement the *Avena* decision has come and gone at this point. History has validated the majority's assessment in *Medellín III* that legislative relief was not likely to be forthcoming.

Finally, in his brief, the Solicitor General asserts that the merits here consist of a procedural opportunity for Leal to have review and reconsideration by a court capable of granting relief, and not a right to a substantive outcome.[5] Solicitor General's Brief at 17. But in *Medellín III* the Court also noted that "the

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[5] The Solicitor General appears to takes a dim view of Leal's chances on his substantive claim—he refused to submit his brief in favor of the petitions and limited his support to the stay. Solicitor General's Brief at 2 n.1.

beginning premise for any stay, and indeed for the assumption that Congress or the legislature might seek to intervene in this suit" must be that the substantive claims of prejudice underlying a petitioner's *Avena* claim are meritorious. As shown in excruciating detail by the courts below, this Leal cannot do.

The State of Texas promised in *Medellín III* that, for inmates named in the *Avena* decision who did not receive "review and reconsideration" of their claims for prejudice under the Vienna Convention, the State would seek a review of the merits of that inmate's claim. However, Leal received a prejudice review of his claim in state court during his first habeas proceeding.[6] Likewise, in its vacated opinion disposing of Leal's second federal habeas petition the district court conducted the precise review and reconsideration mandated by *Avena* and found that Leal had not suffered any actual prejudice because of the government's actions. Additional review of Leal's claims would not yield a different result, and

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[6] The Solicitor General asserts that Leal did not receive a prejudice review in state court. Solicitor General's Brief at 21-22 ("In petitioner's first state habeas proceeding, the court addressed petitioner's Vienna Convention claim relating to his non-custodial statements, but it held that the Vienna Convention was not violated and, accordingly, it did not consider the issue of prejudice). However, this is incorrect. Leal raised a claim under Article 36 of the Vienna Convention during his first state writ proceeding. He asserted that his statements to the police were not voluntary as a consequence of the police's failure to advise him of his right to consular access. While the state court found the claim procedurally barred because of Leal's failure to raise it on direct appeal, the court also issued an expansive alternative holding that "[e]ven if [Leal]'s Vienna [C]onvention claim had been properly raised and proven, the violation would not result in the overturning of the final judgment against [Leal] because [Leal] has failed to show, in any manner, that the violation had an effect on the trial." *Ex parte Leal*, No. 41,743-01 at 271.

Leal's argument is nothing but a transparent attempt to evade his impending execution. Consequently, this petition should be summarily dismissed by the Court and a stay of execution denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The pertinent facts[7] were concisely set forth in the Court of Criminal Appeals opinion as follows:

> The evidence presented at trial shows that on May 20, 1994, the intoxicated sixteen-year-old [Adria Sauceda (Sauceda)] was at a party. The twenty-three-year-old [Leal] also was at the party. At some point the intoxicated but conscious [Sauceda] was placed in [Leal]'s car. [Leal] and [Sauceda] left together in [Leal]'s car. About thirty minutes later, [Leal]'s brother arrived at the party in a car which came to a screeching halt. [Leal]'s brother was very excited or hysterical. [Leal]'s brother started yelling to the people left at the party, "What the hell happened!" [Leal]'s brother was yelling that [Leal] came home with blood on him saying he had killed a girl. Witnesses Torres and Ortega were present when [Leal]'s brother made these statements. Shortly thereafter [Leal]'s brother left in a rush.
>
> Several of the party members went looking for [Sauceda] in the same area where the party was. They found her nude body lying face-up on a dirt road. They noticed [Sauceda]'s head had been bashed in and it was bleeding. Her head was flinching or jerking. These party members called the police.

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[7] The district court provided a considerably more detailed recitation of the facts in its opinion during Leal's third federal habeas proceeding. *Leal Garcia v. Thaler*, No. SA-11-CA-482-OG slip op. at 2-25 (W.D. Tex. June 22, 2011).

When the police arrived, they saw the nude [Sauceda] lying on her back. There was a 30 to 40 pound asphalt rock roughly twice the size of [Sauceda]'s skull lying partially on [Sauceda]'s left arm. Blood was underneath this rock. A smaller rock with blood on it was located near [Sauceda]'s right thigh. There was a gaping hole from the corner of [Sauceda]'s right eye extending to the center of her head from which blood was oozing. [Sauceda]'s head was splattered with blood.

There was a bloody and broken stick approximately 14 to 16 inches long with a screw at the end of it protruding from [Sauceda]'s vagina. Another 4 to 5 inch piece of the stick was lying to the left side of [Sauceda]'s skull. The police made a videotape of the crime scene portions of which were admitted into evidence.

Later that day, the police questioned [Leal]. [Leal] gave two voluntary statements. In [Leal]'s first statement he said he was with [Sauceda] in his car when she began hitting him and the steering wheel causing him to hit a curb. [Leal] attempted to calm her down but [Sauceda] leaped from [Leal]'s car and ran away. [Leal] claimed he sat in his car and waited about ten or fifteen minutes to see if [Sauceda] would return and when she did not he went home.

After giving this statement, [Leal] was informed that his brother had also given a statement. [Leal] then gave another statement. In this statement, [Leal] claimed he followed [Sauceda] when she got out of his car and ran away. [Leal] claimed [Sauceda] attacked him. [Leal] pushed her and she fell to the ground. When she did not get up [Leal] attempted to wake her but could not. He then looked at her nose and saw bubbles. [Leal] stated he got scared, went home, prayed on the side of his mom's bed and told family members what had happened, claiming it was just an accident. After giving this statement an officer gave [Leal] a ride home. The police searched [Leal]'s house. The police seized a blouse which contained several blood stains, hair and fibers. This blouse was later identified as belonging to [Sauceda]. The police also seized [Leal]'s clothing from the night before. [Leal] was arrested later that afternoon at his home.

[Leal]'s car also was impounded. The police conducted Luminol tests of the passenger door to determine whether any blood was evident. Blood stains were discovered on the passenger door and seat. Detectives testified that the blood stains were streaked in a downward motion, indicating the blood had been wiped off. There was insufficient residue to conduct a blood typing of the stains on the vehicle. Other DNA evidence was found on the underwear [Leal] was wearing that night. That evidence consisted of blood as well as bodily fluid. The DNA test did not preclude [Sauceda]'s blood type from the evidence tested.

Dr. DiMaio, the medical examiner who performed the autopsy, testified about [Sauceda]'s injuries and cause of death. DiMaio testified that even though [Sauceda] was intoxicated when she received her injuries, she would have been aware of what was happening to her. In addition to [Sauceda]'s massive head injuries, DiMaio testified about injuries [Sauceda] received to her chest and shoulder which were consistent with having been inflicted by the stick found in [Sauceda]'s vagina. DiMaio also testified about the defensive wounds [Sauceda] received to her hands trying to protect herself from some object. DiMaio also testified [Sauceda] was alive when the stick was placed into her vagina. [Sauceda]'s neck also contained injuries consistent with manual strangulation.

DiMaio testified [Sauceda] received some of her injuries while standing up. [Sauceda] received her head injuries while lying flat. The injuries to [Sauceda]'s head were due to blows from the front. These injuries were inconsistent with a fall. [Sauceda]'s head injuries were consistent with [Sauceda] lying on the ground with somebody standing over her striking her. DiMaio testified the large rock could have delivered the injuries to [Sauceda]'s head. Based on the injuries to [Sauceda]'s head, DiMaio testified [Sauceda] would had to have been struck with the rock two or three times. DiMaio testified [Sauceda] died from blunt trauma injuries to the head. DiMaio could not say for certain that the rock caused the injuries. He testified [Sauceda] was beaten about the face with a blunt object or more than one object which could have been the rock or something else. On cross-examination, DiMaio testified that one blow from the rock could have caused [Sauceda]'s death.

> DiMaio also testified about bite marks he found on [Sauceda]'s left cheek, the right side of her neck and the left side of her chest. Another witness compared the bite marks on [Sauceda]'s chest and neck with dental impressions of [Leal]'s teeth. They matched.
>
> [Leal]'s defensive theory at trial apparently was that [Sauceda] accidentally fell down and hit her head when [Leal] pushed her. [Leal] also presented evidence that he and his girlfriend had sex several hours before [Sauceda] was killed.

Leal v. State, slip op. No. 72,210 at 1-6 (Tex. Crim. App. Feb. 4, 1998). (spaces between paragraphs added).

II. Facts Relating to Punishment

A. Evidence presented by the State

At punishment, the jury learned that two weeks before Sauceda's murder, Leal sexually assaulted another teenage girl and bit her on the neck. 17 RR 23-39, 62-73; SX 106, 107. The jury also learned that, following that assault, Leal had repeatedly telephoned the girl's older sister and threatened to have someone kill her if she testified against him. 17 RR 40-53. Finally, the jury learned that Leal's reputation for being a peaceful and law abiding citizen was bad and that he had a history of intimidating and bullying his fellow students and teachers. *Id.* at 4-17, 54-59.

The State also elicited damaging admissions from Leal and Leal's psychiatric expert on cross-examination. Leal admitted that: (1) as he was taking Sauceda from the party he turned at the end of Vincent Street in the

opposite direction from the way she had directed him to go and when she attempted to get out of his car he refused to allow her to do so and refused to stop so she could do so; (2) when Sauceda finally did exit his car he attempted to take her back at which point she began hitting, pushing, and scratching his face; (3) when Sauceda scratched him, he pushed her, felt something wet on the back of her head, shook her in an unsuccessful attempt to wake her, and then fled in fear when he saw bubbles coming out of her nose; (4) he left Sauceda's fully-clothed body along the side of the street three or four streets over from where her nude body was found; and (5) any person who could bash in Sauceda's head, leave a stick inside her vagina, and take a piece of her clothing as a trophy was a violent and dangerous person. *Id.* at 101-17. Whereas psychiatrist Raymond Potterf admitted that it was possible that Leal's tendency toward violence predated his problems with alcohol, and that persons with anti-social personality disorders tend to ignore societal norms and can be dangerous. *Id.* at 80-82, 83-84.

B. **Evidence presented by the defense**

In Leal's defense, Potterf testified that: (1) Leal suffered from alcohol dependence and pathological intoxication; (2) the latter condition occurs when a person who ingests alcohol experiences a sudden change in mental status and becomes very aggressive; and (3) there is no cure for the condition. *Id.* at 77-79.

Trial counsel also elicited testimony suggesting that Leal had been beaten as a child and that such children tend to develop anti-social personalities. 17 RR 82-83. A former high school teacher testified that Leal had been mistreated by his father and that she did not fear him (*id.* at 85-89); a childhood friend asserted that Leal had saved her life (*id.* at 122-25); Leal's younger brother claimed that Sauceda had sent him love letters (*id.* at 128-30); and Leal's mother noted that Leal began drinking approximately eighteen months before the offense (*id.* at 131-35).

Leal testified at punishment on his own behalf. He stated that: (1) although he did not get along with his father, his father had never beaten or hurt him; (2) he was sorry that Sauceda had died but felt her family, rather than the jury, should decide his fate; (3) he had been a good inmate while awaiting trial, he had no criminal record other than this one offense, and he was not a violent person; (4) he was very drunk the night of the murder and—while what he did was wrong—he had not done what he was accused of; (5) he would probably keep the peace if sent to prison but would act to defend himself if threatened; and (6) he had no gang affiliation. 17 RR 91-96.

III. Direct Appeal and Postconviction Proceedings

Leal was convicted of capital murder for killing Adria Sauceda while in the course of committing kidnaping and aggravated sexual assault. CR 149. Following a separate punishment-phase proceeding, Leal was sentenced to death as mandated by Texas Code of Criminal Procedure art. 37.071 § 2(b) and 2(e). *Id.* at 164. Leal's conviction and sentence were affirmed by the Texas Court of Criminal Appeals. *Leal*, No. 72,210 slip op. at 1. This Court denied certiorari review. *Leal v. Texas*, 525 U.S. 1148 (1999).

While his direct appeal was pending, Leal filed his first state application for a writ of habeas corpus. 1 SHCR-01 2. The trial court held a hearing and subsequently entered findings of fact and conclusions of law recommending that Leal's application be denied. 2 SHCR-01 202-86. The Court of Criminal Appeals denied Leal's application with a written order, and the this Court in turn denied certiorari review. *Id.* at cover and Order; *Leal v. Texas*, 529 U.S. 1026 (2000).

Leal then filed his original federal petition for writ of habeas corpus. The district court entered a memorandum opinion and order as well as a final judgment denying federal habeas relief. *Leal v. Johnson*, No. 99-cv-1301 slip op. (W.D. Tex. 2004) (unpublished). The district court also denied Leal's a COA. The Fifth Circuit likewise denied Leal's request for a COA, and this Court

denied certiorari review. *Leal v. Dretke*, 428 F.3d 543 (5th Cir. 2005); *Leal v. Dretke*, 547 U.S. 1073 (2006).

Leal filed a second state habeas application raising his *Avena* claim on March 24, 2005. SHCR-02 215. The Court of Criminal Appeals dismissed Leal's application as successive pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5.[8] *Ex parte Leal, et al.*, No. 41,743-02 (Tex. Crim. App. Mar. 7, 2007) (unpublished order). Leal filed a petition for a writ of certiorari contesting this decision. On March 25, 2008, this Court decided *Medellín II*, holding that *Avena* was not directly enforceable domestic federal law that preempted state limitations on the filing of successive habeas petitions, and that President Bush's determination did not independently require states to provide reconsideration and review of the claims of the Mexican citizens involved in *Avena* without regard to state procedural default rules. 552 U.S. 491. This Court denied Leal certiorari review shortly thereafter. *Leal v. Texas*, No. 06-11711 (2008).

Following the denial of his second state habeas application, Leal filed his second federal petition for a writ of habeas corpus. R 115. The district court *sua sponte* dismissed the petition without prejudice because Leal had not received

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[8] The Texas court consolidated Leal's successive state application with the applications of Ruben Ramirez Cardenas (No. 48,728-02), Cesar Roberto Fierro (No. 17,425-05), Ignacio Gomez (52,166-02), Roberto Ramos (No. 35,938-02), and Felix Rocha (52,515-03). All are among the fifty-two Mexican nationals who were the named subjects of the *Avena* lawsuit.

permission from the Fifth Circuit to proceed with a successive petition. *Leal v. Thaler*, No. SA-07-CA-214-OG, 2007 WL 4521519 (W.D. Tex. Tex. Dec. 17, 2007). Alternatively, the district court found that Leal's underlying claim was meritless. *Id.* On appeal, the Fifth Circuit vacated the district court's holding that it lacked jurisdiction to consider Leal's second federal habeas petition but nonetheless dismissed with prejudice based on *Medellín II*. *Leal v. Thaler*, No. 08-70003 slip op. (5th Cir. Jun. 24, 2009) (revised July 24, 2009).

During the pendency of his appeal to the Fifth Circuit, Leal also filed a motion for additional DNA testing in the trial court. The trial court denied Leal's motion, and the Court of Criminal Appeals denied Leal's appeal. *Leal v. State*, 303 S.W.3d 292 (Tex. Crim. App. Nov 18, 2009).

Following the denial of his appeal to the Court of Criminal Appeals, Leal filed a Title 28 Section1983 lawsuit in federal district court seeking to compel access to the DNA in question. The federal district court *sua sponte* dismissed Leal's lawsuit without prejudice. *Garcia v. Castillo et al.*, No. 5:09-cv-00950 slip op. (W.D. Tex. Apr. 21, 2010). But Leal later filed an amended complaint following this Court's opinion in *Skinner v. Switzer*, ___ U.S. ___ 131 S. Ct. 1289, 1298 (2011). The district court then released a second memorandum and order dismissing the amended complaint and denying Leal's associated motion for a temporary restraining order. *Leal Garcia v. Castillo et al.*, No. 5:09-cv-00950

slip op. (W.D. Tex. Jun 20, 2011) (DE 31). Leal appealed, but the Fifth Circuit affirmed the decision of the district court. *Leal Garcia v. Castillo*, No. 11-70020 slip op. (5th Cir. Jul. 1, 2011).

Finally, Leal and fellow death-row inmate Cleve Foster filed a lawsuit in the 200th Judicial Court of Travis County challenging the lethal-injection protocol under the APA. The 200th Judicial Court of Travis County dismisses Leal's APA suit for want of jurisdiction. *Foster et al. v. TDCJ*, No. D-1-GN-11-000917. The Texas Court of Appeals, Third District, affirmed the 200th Judicial Court's decision. *Foster et al. v. TDCJ*, 03-11-00287-CV slip op. (Tex. App.—Austin Jun. 10, 2011). Leal appealed, and the Texas Supreme Court denied his petition for review and motion for an emergency stay on June 30, 2011. *Foster et al. v. TDCJ*, No. 11-0465 (Tex. 2011).

On November 8, 2010, the 186th District Court of Bexar County scheduled Leal's execution for July 7, 2011.

On June 16, 2011, Leal filed a slew of motions seeking to reopen his second federal habeas proceedings. The district court denied these motions on June 21, 2011. *Leal Garcia*, No. SA-07-CA-214-OG (DE 28 ("Order Denying Rule 60(b) Motion, Motion for Stay, Etc.")). Leal also filed a third federal habeas petition on June 16, 2011, and amended on June 17, 2011. The district court dismissed this petition without prejudice as plainly meritless on June 22, 2011. *Leal*

Garcia v. Thaler, No. SA-11-CA-482-OG, slip op. (W.D. Tex Jun. 22, 2011). Leal filed a motion for COA and a request for a stay of execution in the Fifth Circuit on June 30, 2011. The Fifth Circuit denied COA and a stay on the same day. *Leal Garcia v. Thaler*, No. 11-70022 slip op. (5th Cir. Jun. 30, 2011).

On June 23, 2011, Leal filed his third subsequent state application for a writ of habeas corpus. The Court of Criminal Appeals dismissed this application in a per curiam opinion. *Ex parte Leal*, No. 41,743-03 slip op. (Tex. Crim. App. Jun. 27, 2011) (unpublished). Two judges did not participate and two judges filed concurring opinions in which two other judges joined. But all of the judges agreed that Leal's claim was barred pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5.

REASONS FOR DENYING THE WRIT

Initially, the question presented for review is unworthy of the Court's attention. The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10 (West 2007). Leal advances no compelling reason in this case, and none exists. Indeed, the issue in this case involves only the lower court's proper application of state procedural rules for collateral review of death sentences. The state court's disposition, which relied upon an adequate and independent state procedural ground, forecloses a stay of execution or certiorari review. Specifically, Leal was cited for abuse of the writ because he did not meet the subsequent application requirements of Tex. Code Crim. Proc. art. 11.071, §5(a).

Additionally, Leal appeals from the dismissal of state habeas proceedings but fails to demonstrate that any aspect of those proceedings violated the Constitution. As Justice O'Connor described the role of state habeas corpus proceedings:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring).

Similarly, Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990):

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Thus, Leal's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

I. Certiorari Review and a Stay of Execution Are Foreclosed by an Independent and Adequate State-Procedural Bar.

In *Avena* the ICJ determined that, based on violations of the Vienna Convention, 51 named Mexican nationals, including Petitioner Humberto Leal, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. Subsequently, the President issued a "Memorandum for the Attorney General" ("Presidential Memorandum"), stating that he had determined that the United States would "discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." However, in *Medellín II* the Court held that *Avena* was not directly enforceable domestic federal law that preempted state limitations on the filing of successive habeas petitions, and that President

Bush's determination did not independently require states to provide reconsideration and review of the claims of the Mexican citizens involved in *Avena* without regard to state procedural default rules. 552 U.S. 491.

Here, Leal's claims are unequivocally procedurally barred because the state court's disposition of the claims relies upon an adequate and independent state-law ground, i.e., the Texas abuse-of-the-writ statute. *See, e.g., Moore v. Texas*, 122 S. Ct. 2350, 2352-53 (2002) (Scalia, J., dissenting); *Emery v. Johnson*, 139 F.3d 191, 195-96 (5th Cir. 1997). This Court has held on numerous occasions that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Thus, there is no basis for granting certiorari review in this case.

II. Leal's Argument That Pending Legislation May Provide Him with Relief Is Foreclosed by *Medellín II*.

Leal raised a claim based on *Avena* in his second federal habeas petition. Prior to *Medellín II*, the district court dismissed Leal's claim as successive and

alternatively found that even if it conducted the precise review and reconsideration envisioned by the ICJ Leal still had not demonstrated that any actual prejudice had accrued as a consequence of the deprivation of his Vienna Convention rights. The Fifth Circuit found that the Presidential Memorandum constituted an intervening factor that rendered Leal's second petition nonsuccessive, but *Medellín II* nonetheless precluded any relief.[9]

> Leal's petition attacked Texas's refusal to comply with *Avena* and the Bush declaration, but that refusal can no longer serve as the basis for a petition for habeas corpus. The Supreme Court's decision in [*Medellín II*], has deprived the *Avena* decision and the Bush declaration of whatever legal force Leal might claim they ever had. Leal cannot now argue that Texas was required to review his case because [*Medellín II*] foreclosed this contention by holding that neither the ICJ nor President Bush had authority to order the State to conduct such a review.

Leal, No. 08-70003 slip op. at 16.

Leal argues that recent legislation introduced into the Senate will provide him with a procedural avenue for the federal courts to hear the merits of his case considered. But Leal's claim that Congress will actually pass this legislation is pure speculation. As correctly found by the district court with respect to Leal's third federal habeas corpus petition, two prior congressional attempts to pass

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[9] The Fifth Circuit vacated the district court's merits ruling because of an improper use of hypothetical jurisdiction.

similar legislation have failed. *Leal Garcia*, No. SA-11-CA-482-OG slip op. at 52.

Indeed, the district court noted that:

> [. . .] Congress has been on notice since long before the ICJ's *Avena* decision of the procedural impediments, as well as adverse substantive rulings, confronting foreign nationals who attempted to assert their rights under Article 36 of the Vienna Convention of this nation.
>
> More than a decade has passed since the Supreme Court applied procedural default principles to a Vienna Convention claim in [*Breard v. Greene*, 523 U.S. 371 (1998)]. More than seven years have passed since the ICJ handed down its *Avena* decision. Almost five years have passed since the Supreme Court handed down its decision in [*Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)], reaffirming its belief that state procedural default principles may permissibly trump any individual rights that foreign citizens may posses[s] under Article 36. More than three years have passed since the Fifth Circuit specifically rejected "on the merits" [Leal]'s last *Avena*/Vienna Convention claim. Since the Supreme Court issued its opinion in [*Medellín II*], apparently two attempts to get legislation through Congress to satisfy the Supreme Court's holding in that cause have been unsuccessful.[10] A third attempt is now underway but at this time has advanced only as far as the filing of more, proposed legislation. Thus, no genuine progress appears to have been made toward the actual passage of new, ameliorative, legislation since the Supreme Court denied Jose Ernesto Medellín's request for a stay of execution in March, 2008.[11]

Id. at 58.

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[10] Leal acknowledges these unsuccessful attempts in his petition. Petition at 6-7.

[11] Medellín was executed on August 8, 2008.

Consequently, the district court correctly held that Leal's claim was "utterly lacking in arguable merit."[12] *Id.* at 51. On appeal, the Fifth Circuit upheld this decision, finding that reasonable jurists could not disagree that:

> the district court correctly concluded that Leal's claim alleging grounds for relief under *Avena* was foreclosed by our earlier decisions. Moreover, until Congress passes a bill which is then signed by the President, or Congress overrides a Presidential veto of same, no new law comes into effect that would create any rights. *See Medellín*, 552 U.S. at 526; *see also Young v. Fordice*, 520 U.S. 273, 282–83 (1997).

Leal Garcia, No. 11-70022 slip op. at 7.

A bill is not federal law. U.S. Const. art I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, *before it becomes a law*, be presented to the President of the United States[.]"). *See, e.g., Gardner v. Collector of Customs*, 73 U.S. 499, 504–06 (1867). And because most bills introduced never become law, it is altogether unsurprising that bills are not afforded legal effect. The request that the Supreme Court issue a stay of execution to extend until the current session of Congress adjourns (on or before January 3, 2012) would thus be remarkable under any circumstances. But the

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[12] In his second Fifth-Circuit appeal, Leal also made an argument that pending congressional legislation might ultimately give him recourse to the federal courts. With respect to this assertion, the Fifth Circuit stated that only "a law, or a State's refusal to comply with such a law might provide a previously unavailable basis for a petition for habeas corpus." *Id.* at 16 n.54. During Leal's third Fifth-Circuit appeal, the court of appeals confirmed that it was only referring to "enacted" legislation. *Leal Garcia*, No. 11-70022 slip op. at 7-8.

audacity of the request regarding Senate Bill 1194 is particularly stark. As noted, in August of 2008, a similar request was made following the Court's decision in *Medellin*. The stay was denied. *Medellin III*, 554 U.S. at 760. The Court explained that because "Congress ha[d] not progressed beyond the bare introduction of a bill in the four year years since the ICJ ruling and the four months since [the *Medellin II* decision]," the "possibilit[y]" that Congress might act was "too remote to justify an order from this Court staying the sentence imposed by the Texas courts." *Id.* at 759, 760. Dissenting Justices urged that a brief stay would allow Congress to act. *Id.* at 761 (Stevens, J., dissenting) (would grant the stay to impose only "the modest burden of a short delay"). *Id.* at 762 (Souter J., dissenting) (suggesting a stay of execution for "the remainder of the 2007 Term"); *id.* at 763 (Ginsburg, J., dissenting) (would grant a stay because "[i]t is not realistic to believe that Congress could act . . . in only [the] few weeks' time" following the *Medellin II* decision).

Since the *Medellin III* decision, thirty-five months have passed. The 110th Congress concluded, the entire 111th Congress met, and the first six months of the 112th Congress have passed. All the while, Congress was aware that it could act if it believed that Medellin's 2008 execution had caused the "irreparable harm to the foreign-policy interests of the United States" the Court is warned would occur if Leal is executed on July 7. Solicitor General's Brief at 26. Three

different Congresses have chosen not to. The "possibility" that Congress may one day act remains far "too remote to justify" a stay in this case. *Medellín II*, 554 U.S. at 759.

As long as *Medellín* remains in effect, Leal is foreclosed from receiving relief on his *Avena* claim. *See Medellín*, 552 U.S. at 526 ("the terms of a non-self-executing treating can become domestic law only in the same way as any other law—through passage of legislation in both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto"); *In re Fierro*, 281 Fed. Appx. 264, 265 (5th Cir. 2008) (proposed legislation was an insufficient basis for continuing a stay and abate order on an *Avena* claim). Until Senator Leahy's bill is passed by Congress and signed by the President, it is simply of "no legal consequence." *Leal Garcia*, No. SA-11-CA-482-OG slip op. at 53.

III. Leal Has Already Received Both State and Federal Prejudice Reviews of His Vienna-Convention Claim.

Leal claims that his statements to the police should have been suppressed because the police failed to advise him of his right to consular access and assistance. He also contends that the investigation and presentation of mitigation evidence during the punishment phase of trial was inadequate and would have benefitted from consular assistance. But this oversight by the police

has been reviewed by both state and federal courts, and no prejudice has ever been found.

A. Leal received a prejudice review in state court.

Leal raised an Article 36 claim during his first state writ proceding. The state court found the claim procedurally barred because of Leal's failure to raise it on direct appeal, but made an alternative finding that no prejudice had accrued. *Ex parte Leal*, No. 41,743-01 at 270. The state court reasoned that since Leal gave his incriminating statements before he was placed under arrest, the police had no obligation to inform him of his Article 36 rights. *Id.* at 268. The court further observed that, in any event, "the violation would not result in the overturning of the final judgment against [Leal] because [Leal] has failed to show, in any manner, that the violation had an effect on the trial." *Id.* at 271.

B. Leal also received a prejudice review in conjunction with his second federal habeas petition.

Leal has also raised his Article 36 claim in his second federal habeas petition. The district court dismissed the petition as successive but also made an alternative finding that even if Leal received the exact same "review and reconsideration" mandated by the ICJ's judgment, Leal would not be entitled to any relief because he did not sustain any actual prejudice as result of the violation of his Vienna Convention rights. While the lower court's ruling on the merits was vacated by the Fifth Circuit in its last opinion due to an improper use

of hypothetical jurisdiction, the Fifth Circuit did not express any concern with the facts as they were found by the lower court. That decision remains persuasive evidence of how the district court would rule on the merits of Leal's *Avena* claim.

Like the state habeas court, the federal district court found that:

> Nothing in either the Vienna Convention or the ICJ's opinion in *Avena* compels local, state, or federal law enforcement authorities in this nation to contact the consulate of a foreign national before those same law enforcement authorities seek to question a foreign national during the investigation of a criminal offense. [Leal] and his brother Gualberto each gave voluntary statements to the police and returned to their home. Neither of these young men were under arrest when police questioned them hours after the discovery of Adria Sauceda's body.

Leal, 2007 WL 4521519 at *21.

Furthermore, the federal district court also observed that the prosecution's case at the guilt-innocence phase of trial was supported by overwhelming evidence. *Id.* at *8-13. The court stated that even if Leal had presented the same factual and expert testimony at trial which he presented during his first state habeas corpus proceeding, there is no possibility the outcome at the guilt-innocence phase of trial would have been different. *Id.* at *21. Leal and his brother made inculpatory statements to the police prior to his arrest, and thus, prior to the attachment of any Vienna Convention rights. Indeed, this Court was clear in *Sanchez-Llamas* that suppression of evidence is not an available remedy

where the Vienna Convention "does not provide a particular remedy, either expressly or implicitly." 548 U.S. at 347. Thus, "it is not for the federal courts to impose one on the States through lawmaking of their own." *Id.*

> The provision secures only a right of foreign nationals to have their consulate informed of their arrest or detention-not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.

Id. at 349.

Furthermore, the prosecution presented extensive evidence at guilt-innocence that included:

> [. . .] (1) the eyewitness testimony of disinterested witnesses who placed the victim's last known location inside the vehicle [Leal] used to drive her away from an outdoor party, (2) expert forensic testimony establishing that traces of blood were found on both the interior and exterior of that same vehicle shortly after Adria Sauceda's murder, (3) expert testimony establishing [Leal]'s teeth matched the bite marks found on Adria's neck and chest, (4) the highly inculpatory declarations of [Leal]'s brother Gualberto made to the party-goers shortly after [Leal] departed the party with Adria, (5) the forensic evidence suggesting Adria violently battled her assailant, and (6) corresponding evidence showing the multiple scratches, abrasions, and other wounds on [Leal]'s face and upper body at the time of his arrest.

Leal, 2007 WL 4521519 at *8.

Similarly, with regard to punishment the district court noted:

> [D]espite the assistance of the Mexican government for nearly a decade, [Leal] is unable to furnish this Court with any fact-specific allegations, much less any evidence, showing any additional financial or legal assistance from Mexico at the time of [Leal]'s trial

> would have produced additional investigation into [Leal]'s background yielding the discovery, development, or presentation of any additional mitigating evidence.

Id. at *22.[13]

The district court noted that Leal took the stand during punishment, but refused to admit that he killed the victim, despite his own admissions that he had fought with the victim and abandoned her when she was knocked unconscious. The prosecution also presented evidence that Leal had sexually assaulted and bit another sixteen-year-old girl mere weeks before the instant offense.[14]

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[13] The Mexican government has submitted an amicus brief in this matter detailing the assistance that it provides for its citizens. While this assistance is no doubt substantial, Leal has had access to it for many years now. In fact, assistance from the Mexican government has been available to Leal from his first state habeas application onward. To the extent this assistance would have made a difference, it would have done so already.

[14] In its opinion dismissing Leal's Section 1983 lawsuit, the district court also noted:

> [E]ven disregarding the stains on the [Leal's] underwear, the evidence now before this Court (including the uncontradicted testimony from [Leal's] trial counsel during [Leal's] first state habeas corpus proceeding establishes (1) Leal drove a semi-unconscious Adria away from a party after she had already been repeatedly sexually assaulted by other men; (2) not long thereafter [Leal's] brother arrived at the party and exclaimed in an excited manner that plaintiff had arrived home bloody and mumbling about having killed a girl, (3) shortly thereafter, Adria's nude body was discovered with her head badly bludgeoned, (4) a piece of lumber was protruding from her vagina, (5) autopsy results showed the metal bolt on the end of the piece of lumber used to violate Adria's body had caused internal bruising establishing she was still alive when she was brutally violated with that piece of wood, (6) [Leal]

C. Leal's new evidence would not change the district court's analysis.

The district court correctly notes that Leal has sought to present new evidence in support of his claim:

> [Leal]'s Amended Petition presents a number of new arguments which have never previously been presented to any state or federal court, to wit, arguments that (1) [Leal] is mentally retarded and, therefore, exempt from execution under the Supreme Court's holding in [*Atkins v. Virginia*, 536 U.S. 304 (2002)], (2) new scientific advances have rendered the "bite mark evidence" presented during [Leal]'s trial inherently unreliable and inadmissible under the Supreme Court's holding in [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)], (3) the prosecution's evidence showing the presence of "blood" inside and on the exterior of [Leal]'s vehicle was based on now—discredited theories about Luminol reliability which are no longer valid, rendering such testimony inadmissible under the *Daubert* standard, (4) [Leal]'s trial counsel rendered ineffective assistance by (a) failing to adequately investigate [Leal]'s background, (b) failing to develop and present potentially mitigating evidence showing (i) [Leal] was physically abused as a child by both his parents, (ii) as a child, [Leal] was molested and raped by a pedophile priest, and (iii) [Leal] suffered multiple head injuries as a child which caused organic brain damage which restrict [Leal]'s abilities to function intellectually, socially, and emotionally, and (c) failing to call [Leal]'s parents to testify regarding the circumstances surrounding the discovery of Adria Sauceda's blood blouse inside their home, and

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> admitted to his trial counsel he had fought violently with Adria and plaintiff's body bore the marks of a violent confrontation, (7) Adria's blood-stained blouse was found inside plaintiff's residence, (8) there was evidence of blood-stains on the inside and exterior of the vehicle plaintiff had used to drive Adria away from the party, (9) [Leal] admitted to his trial counsel he was alone with Adria when she "fell" and began bleeding from the nose, (10) [Leal's] teeth matched the bite marks on Adria's body, and (11) [Leal] was the last person to see Adria alive.

Leal Garcia, No. 5:09-cv-00950 slip op. at 43-44.

(5) additional DNA testing might exclude some portion of the prosecution's evidence introduced during [Leal]'s trial.

Leal Garcia, No. SA-11-CA-483-OG slip op. at 46-47.

But these claims have been available for years and years[15], and Leal is raising them only now with his execution imminent. As for his new claim of sexual abuse at the hands of a pedophile priest, Leal has provided no evidence except hearsay testimony from a psychologist who spoke to him and reports of *other* former abused children who do not state that Leal was abused. Leal's own affidavit is conspicuously absent. Furthermore, the fact of this abuse was clearly known to Leal at the time of trial, and he could have related it to trial counsel if he had wanted to. Or, indeed, he could have related it to *any* of his attorneys during the last sixteen years of litigation. By refusing to divulge this information earlier when he had the opportunity, Leal has plainly defaulted any claim of ineffective assistance of counsel based on priest abuse.

D. Further review would not yield relief for Leal.

Thus, even the bill introduced last week in Congress would allow federal courts to review cases of condemned foreign nationals on the merits and without regard to any procedural default, the state court and the court below have

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[15] The factual predicates of all of these claims have been available since before trial. The legal arguments have also been available—save for Leal's mental-retardation claim, which was not ripe until *Atkins* was rendered by the Supreme Court. Nonetheless, *Atkins* was decided over nine years ago, and Leal could have raised his claim at any time since then.

already conducted a prejudice review and found that Leal was not harmed by his lack of consular access. Leal has not demonstrated that the result on his second attempt would be any different.

IV. Leal Is Not Entitled to a Stay of Execution.

A stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id. (citing Nelson*, 541 U.S. at 649-650). It is well-established that petitioners on death row must show a "reasonable probability" that the underlying issue is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Indeed, "[a]pplications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted." *Id.* In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id.* at 893.

Here, Leal fails to advance a valid claim for relief. Therefore, a stay of execution is unnecessary, and his request should be denied. The State

acknowledges that the harm to Leal would be irreparable should the Court refuse to grant the stay. But there is simply no reasonable probability that the Court will grant Leal's petition for certiorari. Leal simply does not have any judicial remedies remaining to him. Leal must proceed through clemency if he is to obtain any relief.[16] Moreover, the State's strong interest in the timely enforcement of a sentence is not outweighed by the unlikely possibility that Leal's petition for certiorari will be granted. Leal's assertions reveal his claim to be nothing more than a calculated and meritless attempt to postpone his already-delayed execution.

CONCLUSION

For the foregoing reasons, Leal's petition for writ of certiorari should be denied. Additionally, Leal does not demonstrate that reasonable jurists would debate these issues or that a court could resolve them in a different manner. Thus, he is not entitled to a stay of execution.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

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[16] Leal's clemency petition is pending, and the Texas Board of Pardons and Paroles and the Governor have the authority to stay the execution if they are so inclined.

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SUPPLEMENTAL BRIEF

Supreme Court, U.S.
FILED
JUL - 1 2011
OFFICE OF THE CLERK

No. 11-5001

IN THE

Supreme Court of the United States

HUMBERTO LEAL GARCÍA,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

SUPPLEMENTAL BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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THIS IS A CAPITAL CASE. MR. LEAL IS SCHEDULED TO BE EXECUTED JULY 7, 2011

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Petitioner Humberto Leal Garcia presents this additional brief to supplement his Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals, dated June 27, 2011. New information has emerged since Mr. Leal filed his Petition with this Court, revealing that legislation currently pending in the Senate, the "Consular Notification Compliance Act" ("CNCA"), enjoys an exceptional degree of support from the highest-ranking members of the Obama Administration. Additionally, in remarks on the Senate floor on June 29, 2011, Senator Patrick Leahy reaffirmed his commitment to passing the CNCA, and indicated that he would schedule a hearing on the bill in July. A5. This bolsters Mr. Leal's contention that the bill, which already attracts solid bipartisan support, is likely to be enacted into legislation before the end of the current congressional session.

In a letter addressed to Senator Patrick Leahy, who introduced the bill, Secretary of State Hillary Clinton and Attorney General Eric Holder express their unqualified endorsement of the form, content and timing of the CNCA. *See* A1-A3, Letter from Secretary of State Clinton and Attorney General Holder to Senator Patrick Leahy (June 28, 2011). In their letter of thanks to Senator Leahy for his efforts to enact the legislation, the Secretary of State and the Attorney General characterize the CNCA as "a carefully crafted, measured, and essential legislative solution to ... critical concerns". A3.

The Secretary of State and Attorney General emphasize that the CNCA serves an objective of fundamental importance: ensuring that the United States complies with its international obligations on consular access, and thus strengthening its ability to extend consular assistance to its own citizens. As the authors of the letter state, for "[t]he

millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, ...[consular] assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown." A1. For U.S. citizens "lost in a foreign legal system," "the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance. A1.

The CNCA not only serves an essential national objective - the protection of U.S. citizens abroad – it also does so by striking what the Secretary of State and Attorney General see as the optimal balance between the interests at stake:

> By setting forth the minimal, practical steps that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations,...the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future violations. . .The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights.

A1-A2.

Moreover, the Secretary of State and Attorney General welcome the timely introduction of the bill:

> After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice. ... this Administration believes that legislation is an optimal way to give domestic legal effect to the *Avena* judgment and to comply with the U.S. Supreme Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008).

A2.

Finally, the CNCA would allow the U.S. to fulfill a long outstanding international obligation at a time when its diplomatic partnership with Mexico has become central to national U.S. law enforcement programs.

> The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely ... have repeatedly and forcefully called upon the United States to fulfill obligations arising from *Avena* ...This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with *Avena* has become a significant irritant that jeopardizes bilateral initiatives.

A2.

Respectfully submitted,

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July 1, 2011

* Counsel of Record; Member, Supreme Court Bar

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that I am counsel in this matter for Humberto Leal Garcia; that on this day, July 1, 2011, I caused the foregoing **Supplemental Brief to the Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas** to be served on opposing counsel electronically via e-mail delivery and by federal express delivery to:

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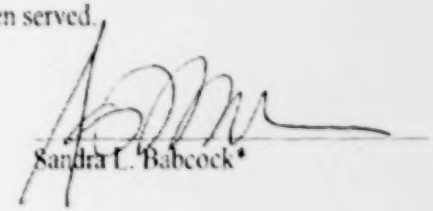
and that all parties required to be served have been served.



Sandra L. Babcock*

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Supreme Court, U.S.
FILED
JUL - 1 2011
OFFICE OF THE CLERK

No. 11-5001

IN THE

Supreme Court of the United States

HUMBERTO LEAL GARCIA,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

APPENDIX TO THE SUPPLEMENTAL BRIEF TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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THIS IS A CAPITAL CASE. MR. LEAL IS SCHEDULED TO BE EXECUTED JULY 7, 2011

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June 28, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We thank you for your extraordinary efforts to enact legislation that would facilitate U.S. compliance with its consular notification and access obligations and to express the Administration's strong support for S. 1194, the Consular Notification Compliance Act of 2011 (CNCA).

The millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, are accorded critical protections by international treaties that ensure that detained foreign nationals have access to their country's consulate. Consular assistance is one of the most important services that the United States provides its citizens abroad. Through our consulates, the United States searches for citizens overseas who are missing, visits citizens in detention overseas to ensure they receive fair and humane treatment, works to secure the release of those unjustly detained, and provides countless other consular services. Such assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown. For U.S. citizens arrested abroad, the assistance of their consulate is often essential for them to gain knowledge about the foreign country's legal system and how to access a lawyer, to report concerns about treatment in detention, to send messages to their family, or to obtain needed food or medicine. Prompt access to U.S. consular officers prevents U.S. citizen prisoners from being lost in a foreign legal system.

The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States. By sending a strong message about how seriously the United States takes its own consular notification and access obligations, the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance.

The CNCA will help us ensure that the United States complies fully with our obligations to provide foreign nationals detained in the United States with the opportunity to have their consulate notified and to receive consular assistance. By setting forth the minimal, practical steps that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations (VCCR) and similar bilateral international agreements, the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future

violations and potential claims of prejudice for those who are prosecuted and ultimately convicted. In this regard, the legislation is an invaluable complement to the extensive training efforts each of our Departments conducts in this area.

The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights. By allowing defendants facing capital charges to raise timely claims that authorities have failed to provide consular notification and access, and to ensure that notification and access is afforded at that time, the CNCA further minimizes the risk that a violation could later call into question the conviction or sentence. The CNCA provides a limited post-conviction remedy for defendants who were convicted and sentenced to death before the law becomes effective. To obtain relief, such defendants face a high bar: They must establish not only a violation of their consular notification rights but also that the violation resulted in actual prejudice. Going forward, the CNCA permits defendants who claim a violation of their VCCR rights an opportunity for meaningful access to their consulate but does not otherwise create any judicially enforceable rights.

After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31). As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the *Avena* judgment and to comply with the U.S. Supreme Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The CNCA will remove a long-standing obstacle in our relationship with Mexico and other important allies, and send a strong message to the international community about the U.S. commitment to honoring our international legal obligations.

The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely—including Mexico, the United Kingdom, the European Union, Brazil and numerous other Latin American countries, and the Council of Europe, among others—have repeatedly and forcefully called upon the United States to fulfill obligations arising from *Avena* and prior ICJ cases finding notification and access violations. We understand that the Governments of Mexico and the United Kingdom have already written to Congress to express their strong support for this legislation.

This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with *Avena* has become a significant irritant that jeopardizes other bilateral initiatives. Mexico considers the resolution of the *Avena* problem a priority for our bilateral agenda. The CNCA will help ensure that the excellent U.S.-Mexico cooperation in extradition and other judicial proceedings, the fight against drug trafficking and organized crime, and in a host of other areas continues apace.

In sum, the CNCA is a carefully crafted, measured, and essential legislative solution to these critical concerns. We thank you again for your work towards finding an appropriate legislative solution to this matter of fundamental importance to our ability to protect Americans overseas and preserve some of our most vital international relationships.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Hillary Rodham Clinton
Secretary of State

complete its work and have the FBI Director in place at the end of the summer. That agreement would take the form of a unanimous consent agreement in the Senate, entered into by all Senators, and locked in on the RECORD so that it could not be changed without unanimous consent. That has not occurred. That is the only way to ensure Senate action on a nomination before August 3. The House would also have to agree to such an approach.

Senator COBURN has been unable to convince his leadership and the Republican caucus to agree. It may be because some do not want to agree. It may be because some do not want to give up the "leverage" such a nomination might provide to them on other matters. Maybe they just do not want to make anything too "easy" on this President. Whatever the reasons, no such agreement has been forthcoming in the weeks it has been under consideration.

In fact, at the Judiciary Committee business meeting on the bill, when Senator COBURN could not offer the assurances required to lock in prompt and timely consideration of a subsequent nomination of the FBI Director after enactment of legislation and before August 3, he did suggest that his side of the aisle would forego several steps of the standard process for considering nominees. He offered to waive the questionnaire, the background check, and the confirmation hearing on Director Mueller. But this commitment was illusory, because not even all of the Republican members of the Judiciary Committee agreed. Senator CORNYN, having questioned Director Mueller's "management capacity," indicated that he wanted confirmation hearings and the opportunity to ask questions. Of course, the Senator from Texas was within his rights to say so. But that shows the practical difficulties of following Senator COBURN's complicated, two-part scenario with no guarantee of it being completed by August 3.

Republican Senators lectured us on the ease with which the majority leader should be able to obtain cloture on a new nomination of Director Mueller. That again makes my point. Without a binding agreement, it could take days to consider the nomination, perhaps a full week.

We have just witnessed Senate Republicans filibustering for the first time in American history the nomination of the Deputy Attorney General of the United States. They did that just last month. While Senator CORNYN opined that the renomination of Director Mueller should be able to get 60 votes for cloture, and we should be able to end a filibuster of the nomination on the Senate floor, he also said that he could not control other Republican Senators.

To complete action in accordance with Senator COBURN's alternative plan would mean not only passing legislation but the Senate receiving, considering and confirming the renomination of Director Mueller. I was chairman of the Judiciary Committee back in 2001 when the Senate considered and confirmed Director Mueller's initial nomination within two weeks. I worked hard to make that happen. Regrettably, given the current practices of Senate Republicans, and their unwillingness to agree on expedited treatment for President Obama's nominations, it is foolhardy in my judgment to think that all Senate Republicans will cooperate without the binding force of a unanimous consent entered in the RECORD.

Let me mention just one more recent example. Consider the time line of the nomination of the Assistant Attorney General for the National Security Division at the Department of Justice. The nominee was approved unanimously by the Senate Judiciary Committee and unanimously by the Senate Select Committee on Intelligence, and approved unanimously by the Senate just yesterday. That nomination took 15 weeks for the Senate to consider—and she was approved unanimously. It took more than a month just to schedule the Senate vote after the nomination was reported unanimously by the Senate Select Committee on Intelligence, and that was 2½ weeks after it was unanimously reported by the Senate Judiciary Committee. This was a nominee with whom many of us were familiar and who faced no opposition.

Of course, in the case of the FBI Director, there is no necessity to require a new nomination. The simple one-time extension contained in S. 1103 does the job. It provides all the authority needed for the President to ask Director Mueller to stay on and for him to do so without additional action by the Senate. The separate renomination of Director Mueller is not required.

As I have said, all Senate Democrats are prepared to take up and pass S. 1103, and send it to the House of Representatives for it to take final action before August 3. That is what we should be doing. We should do that now, before the Fourth of July recess. There is no good reason for delay. All that is lacking is Senate Republicans' consent.

So, as they stall in moving legislation to respond to President Obama's request to extend Director Mueller's term, Senate Republicans will not commit to the unanimous consent request necessary to allow Senator COBURN's alternative to become a possibility. Seven of the eight Republican members of the Senate Judiciary Committee voted against the bill to extend Director Mueller's term. Senator COBURN had said that if his alternative was not adopted by the committee, he would vote for the bill, but then he changed his mind and voted against. He then said that he will vote for the bill, S. 1103, when it is considered by the Senate, but Senate Republicans—perhaps including Senator COBURN himself—are now objecting to considering it. We have lost another two weeks since the bill was reported by the Judiciary Committee.

Finally, I observe that this is not the only matter the Senate needs to consider before August 3. There is the matter of the United States' default unless the debt ceiling is raised by that time. There is the need to pass the America Invents Act, as passed by the House, to spur innovation and jobs. There are currently 10 executive nominations ready for Senate action reported by the Judiciary Committee and 18 judicial nominations ready for final consideration to address the judicial vacancies crisis. There is much to do, little time, and even less cooperation.

This important legislation, S. 1103, would fulfill the President's request that Congress create a one-time exception to the statutory 10-year term of the FBI Director in order to extend the term of the incumbent FBI Director for 2 additional years. Given the continuing threat to our Nation, especially with the tenth anniversary of the September 11, 2001, attacks approaching, and the need to provide continuity and stability on the President's national security team, it is important that we respond to the President's request and enact this necessary legislation swiftly. The incumbent FBI Director's term otherwise expires on August 3, 2011. I urge the Senate to take up this critical legislation and pass it without further delay.

CONSULAR NOTIFICATION COMPLIANCE ACT

Mr. LEAHY. Mr. President, on June 14, 2011, I introduced the Consular Notification Compliance Act. This legislation will help bring the United States into compliance with its obligations under the Vienna Convention on Consular Relations, VCCR, and is critical to ensuring the protection of Americans traveling overseas.

Each year, thousands of Americans are arrested and imprisoned when they are in foreign countries studying, working, serving in the military, or traveling. From the moment they are detained, their safety and well-being depends, often entirely, on the ability of U.S. consular officials to meet with them, monitor their treatment, help them obtain legal assistance, and connect them to family back home. That access is protected by the consular notification provisions of the VCCR, but it only functions effectively if every country meets its obligations under the treaty—including the United States.

As we now know, in some instances, the United States has not been meeting those obligations. There are currently more than 100 foreign nationals on death row in the United States, most of whom were never told of their right to contact their consulate, and their consulate was never notified of their arrest, trial, conviction, or sentence. This failure to comply with our treaty obligations undercuts our ability to

protect Americans abroad and deeply damages our image as a country that abides by its promises and the rule of law. It would also be completely unacceptable to us if our citizens were treated in this manner.

The Consular Notification Compliance Act seeks to bring the United States one step closer to compliance with the convention. It is a narrowly crafted solution. It focuses only on the most serious cases—those involving the death penalty—but it is a significant step in the right direction and we need to work together to pass it quickly. Texas is poised to execute the next foreign national affected by this failure to comply with the treaty on July 7, 2011. He was not notified of his right to consular assistance, and the Government of Mexico has expressed grave concerns about the case. We do not want this execution to be interpreted as a sign that the United States does not take its treaty obligations seriously, or to further damage relations with an important ally with which we share a border. That message puts American lives at risk.

Since introduction of the Consular Notification and Compliance Act, the Department of Justice and the Department of State have worked with me to explain the importance of the bill, its limited nature, and the urgent need to see it passed. On June 28, Attorney General Holder and Secretary Clinton wrote to me in support of the "carefully crafted, measured, and essential legislative solution" included in the Consular Notification and Compliance Act. I will ask consent to have a copy of the letter printed in the RECORD at the conclusion of my remarks. We have already had productive discussions with Republicans and Democrats from both the House and Senate. I appreciate that others are willing to work together to address this critical issue.

I also want to note all of the favorable commentary the bill has generated, including multiple editorials in major newspapers and numerous letters of support from across the political spectrum. I also will ask that a selection of those be printed in the RECORD following my remarks.

Everyone agrees that this legislation is not about giving breaks to criminals. It is not about expanding habeas corpus relief. It is not about weakening the death penalty. This bill is about three things only. It is about protecting Americans when they work, travel, and serve in the military in foreign countries. It is about fulfilling our obligations and upholding the rule of law. And it is about removing a significant impediment to full and complete cooperation with our international allies on national security and law enforcement efforts that keep Americans safe.

The bottom line is this—our failure to comply with our legal obligations places Americans at risk. As chairman of the Senate Judiciary Committee, I am announcing that I intend to hold a hearing on this critical issue in July. We must work together, and we must act now.

Mr. President, I ask unanimous consent to have printed in the RECORD the letters and editorials to which I referred.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

JUNE 28, 2011.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: We thank you for your extraordinary efforts to enact legislation that would facilitate U.S. compliance with its consular notification and access obligations and to express the Administration's strong support for S. 1194, the Consular Notification Compliance Act of 2011 (CNCA).

The millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, are accorded critical protections by international treaties that ensure that detained foreign nationals have access to their country's consulate. Consular assistance is one of the most important services that the United States provides its citizens abroad. Through our consulates, the United States searches for citizens overseas who are missing, visits citizens in detention overseas to ensure they receive fair and humane treatment, works to secure the release of those unjustly detained, and provides countless other consular services. Such assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown. For U.S. citizens arrested abroad, the assistance of their consulate is often essential for them to gain knowledge about the foreign country's legal system and how to access a lawyer, to report concerns about treatment in detention, to send messages to their family, or to obtain needed food or medicine. Prompt access to U.S. consular officers prevents U.S. citizen prisoners from being lost in a foreign legal system.

The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States. By sending a strong message about how seriously the United States takes its own consular notification and access obligations, the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance.

The CNCA will help us ensure that the United States complies fully with our obligations to provide foreign nationals detained in the United States with the opportunity to have their consulate notified and to receive consular assistance. By setting forth the minimal, practical steps that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations (VCCR) and similar bilateral international agreements, the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future violations and potential claims of prejudice for those who are prosecuted and ultimately convicted. In this regard, the legislation is an invaluable complement to the extensive training efforts each of our Departments conducts in this area.

The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights. By allowing defendants facing capital charges to raise timely claims that authorities have failed to provide consular notification and access, and to ensure that notification and access is afforded at that time, the CNCA further minimizes the risk that a violation could later call into question the conviction or sentence. The CNCA provides a limited post-conviction remedy for defendants who were convicted and sentenced to death before the law becomes effective. To obtain relief, such defendants face a high bar. They must establish not only a violation of their consular notification rights but also that the violation resulted in actual prejudice. Going forward, the CNCA permits defendants who claim a violation of their VCCR rights an opportunity for meaningful access to their consulate but does not otherwise create any judicially enforceable rights.

After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals (Mex. v. US.)*, 2004 I.C.J. 12 (Mar. 31). As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the Avena judgment and to comply with the U.S. Supreme Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The CNCA will remove a long-standing obstacle in our relationship with Mexico and other important allies, and send a strong message to the international community about the U.S. commitment to honoring our international legal obligations.

The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely—including Mexico, the United Kingdom, the European Union, Brazil and numerous other Latin American countries, and the Council of Europe, among others—have repeatedly and forcefully called upon the United States to fulfill obligations arising from Avena and prior ICJ cases finding notification and access violations. We understand that the Governments of Mexico and the United Kingdom have already written to Congress to express their strong support for this legislation.

This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with Avena has become a significant irritant that jeopardizes other bilateral initiatives. Mexico considers the resolution of the Avena problem a priority for our bilateral agenda. The CNCA will help ensure that the excellent U.S.-Mexico cooperation in extradition and other judicial proceedings, the fight against drug trafficking and organized crime, and in a host of other areas continues apace.

In sum, the CNCA is a carefully crafted, measured, and essential legislative solution to these critical concerns. We thank you again for your work towards finding an appropriate legislative solution to this matter of fundamental importance to our ability to protect Americans overseas and preserve some of our most vital international relationships.

Sincerely,

ERIC H. HOLDER, JR.,
Attorney General.
HILLARY RODHAM CLINTON,
Secretary of State.

[From the Washington Post, June 13, 2011]

WHY THE U.S. SHOULD ALLOW ARRESTED FOREIGNERS TO CONTACT THEIR CONSULATES

Humberto Leal Jr. is scheduled to be put to death by the state of Texas next month

for the 1994 murder of a 16-year-old girl. Like so many cases involving capital punishment, Mr. Leal's has generated controversy, but not for the typical reasons.

Mr. Leal is a Mexican national. When he was arrested, Texas officials failed to advise him of his right to communicate with his country's embassy as required by the Vienna Convention on Consular Relations. The United States, Mexico and some 160 other countries are signatories to the convention. Mr. Leal is one of roughly 40 Mexican nationals who were not advised about consular access and who sit on death row in this country.

Mexico filed a grievance on behalf of its nationals and prevailed in 2004 before the International Court of Justice (ICJ), the judicial arm of the United Nations. The ICJ concluded that the United States was obligated to comply with the treaty and that it should review these cases to determine whether the defendants had been harmed by the lack of notification.

Texas, where the majority of these inmates are held, balked. Three years ago, the state executed Jose Ernesto Medellin, another Mexican national who was not informed of his right to consular access and who was denied additional review. The state is likely to take the same approach in the Leal case. "Here, in Texas, if you commit terrible and heinous crimes you're going to pay the ultimate price," says Katherine Cesinger, press secretary to Gov. Rick Perry.

This misses the point entirely. This is not about coddling criminals nor is it a referendum on the death penalty. It is about a country's obligation to honor its treaty commitments. The United States must comply with the Vienna Convention—and demonstrate good faith in addressing past mistakes—if U.S. citizens abroad are to be afforded the same rights and protections.

Sen. Patrick J. Leahy (D-Vt.) is expected to introduce legislation as soon as this week to provide meaningful review in federal court for those denied consular access. The legislation should be narrowly tailored and mandate that the legal proceedings focus solely on whether denial of access seriously prejudiced an inmate's ability to defend against charges. The bar for success should be high, and only those who can provide compelling evidence of such harm should be allowed a new trial or benefit from a reduced sentence.

To avoid this problem in the future, federal and state governments should be diligent about abiding by the treaty's mandates. The State Department should continue its outreach to state and local governments to impress upon law enforcement officials the importance of the consular notification. Complying with the treaty is not only the right thing to do; it is the smart and self-interested thing to do.

[From the New York Times, June 17, 2011]

THE TREATY AND THE LAW

Humberto Leal Garcia Jr., a Mexican citizen who faces execution in Texas next month, has petitioned Gov. Rick Perry for a six-month reprieve. He is asking for a stay under a vital international law, the Vienna Convention on Consular Relations, which requires that foreign nationals who are arrested be told of their right to have their embassy notified of that arrest and to ask for help.

In recent years, the treaty has provided important protection for Americans who have been detained in Iran, North Korea and elsewhere. Mr. Leal was not notified after his arrest of his right to contact his embassy. But the Supreme Court ruled in 2008 that Texas did not need to comply with the treaty because there is no federal law requiring that states do so.

Senator Patrick Leahy of Vermont on Tuesday introduced a bill that makes clear that federal law requires that states tell foreign nationals who have been arrested that they can contact their consulates for help.

For those who were convicted and sentenced without being told, the bill would let them ask a federal court to review their case and decide whether the outcome would have been different if they had had diplomatic help. After the bill was introduced, Mr. Leal petitioned Federal District Court for a stay to keep Texas from "rushing to execute" him before Congress has time to act.

Mr. Leal, convicted of murder during a sexual assault, had grossly incompetent legal representation. If he had been given access to a Mexican diplomat, he would have had a chance at better counsel and likely the opportunity to strike a plea deal, avoiding the death penalty.

For the sake of justice, the governor and court should grant the stays. For the protection of foreigners arrested here, and American citizens arrested abroad, Congress should pass Senator Leahy's bill.

[From the Austin American Statesman, June 10, 2011]

EXECUTION CASE IMPORTANT TO INTERNATIONAL RELATIONS

The Golden Rule of life also applies to the tricky business of international relations. What we do to non-Americans in our country we can reasonably expect to be done unto Americans in other countries.

It is for that reason that Gov. Rick Perry and the Texas Board of Pardons and Paroles—both in the uncommon position of making a decision with international impact—should commute or postpone the death sentence of Humberto Leal, a Mexican raised in Texas, scheduled to die July 7 for the 1994 murder of Adria Sauceda, 16, in Bexar County.

The key issue in this case at this point is not whether Leal committed the crime. Also not central now are the circumstances involving Leal, including sexual abuse by a priest, a challenging family history and other factors that, though significant, fail to add up to justification for murder. They could, however, count as mitigating factors that argue for a life sentence.

It's what happened after Sauceda was killed that is at issue. More specifically, it's what didn't happen. Despite the Vienna Convention on Consular Relations requirements, Leal was not informed of his right to contact Mexican officials to seek legal assistance. Records indicate that he was not aware of that right until told about it by a fellow death row inmate.

Instead of getting legal help from Mexican consular officials, who have a track record of providing quality legal representation for Mexicans facing the death penalty in the U.S., Leal was represented by a court-appointed team that included a lawyer who twice had his license suspended.

Back in 2004, the International Court of Justice said Leal was entitled to a hearing to determine the extent of harm he suffered as a result of the lack of consular access. A U.S. Supreme Court ruling has said the U.S. must comply with the decision by the international court. Texas, citing state law, said no such hearing could take place. Congress now is poised to consider legislation, to be filed in coming weeks, that would establish a procedure for a federal court hearing on the extent of harm caused to Leal because he was not advised of his right to contact Mexican officials.

In a clemency petition filed this week, an impressive list of former U.S. diplomats, retired military leaders and others concerned about international matters urged a stay of execution to grant Congress time to deal with this case.

At stake, they said, are the consular rights of Americans who become entangled in legal problems while out of the country.

"For Texas to proceed with (Leal's) execution prior to full compliance with these treaty obligations would endanger the interests of American citizens and the United States around the world," John B. Bellinger III, a State Department legal adviser in the George W. Bush administration, said in a letter signed by others and delivered to Perry.

The former military leaders told Perry that "improving U.S. enforcement of its consular notification and legal access obligations will help protect American citizens detained abroad, including U.S. military personnel and the families stationed overseas."

Sandra L. Babcock, a Northwestern University law professor representing Leal, said he would not have been convicted if he had received proper consular assistance. We have no way of knowing that. But there is no arguing with Babcock's contention that "with consular access, Mr. Leal would have had competent lawyers and expert assistance that would have transformed the quality of his defense."

And, as she noted, Mexican officials have developed expertise in helping Mexicans facing the death penalty in the U.S.

"It really is a very modest remedy we are talking about," Babcock said.

Modest, indeed, but with important international ramifications.

[From the Houston Chronicle, June 22, 2011]

KEEPING OUR WORD: SCHEDULED TEXAS EXECUTION VIOLATES TREATY AND ENDANGERS AMERICANS ABROAD

Americans traveling abroad are protected, whether they are aware of it or not, by a treaty called the Vienna Convention on Consular Relations, ratified by about 170 countries, which guarantees them access to U.S. consular assistance if they are detained or arrested in a foreign country. In 2010, more than 6,800 Americans were arrested abroad, and more than 3,000 were incarcerated. Many of them benefited from the protections of this treaty.

But unfortunately, the U.S. has repeatedly failed to offer those same protections to foreigners on U.S. soil. The most egregious of these violations is the denial of consular assistance to foreign nationals convicted and sentenced to death. (Currently, about 100 foreign nationals are on U.S. death rows.) And in a particularly urgent case, one of those individuals whose rights were violated, a Mexican national named Humberto Leal Garcia, is scheduled to be executed on July 7 in Huntsville.

Because a bill has been introduced to bring the U.S. into compliance with the treaty, Leal's attorneys have filed a federal petition and a motion for a stay of execution so that Leal will be alive and eligible for the remedies of this legislation when it becomes law.

There are compelling reasons why these petitions should be granted. Chief among them is the fact that this pending legislation will allow for review of cases like Leal's, said his attorney Sandra Babcock, "where lack of consular assistance may well have made the difference between life and death. That's why the consular access really matters." Mexico provides top flight legal assistance to its nationals under such circumstances.

Leal's court-appointed attorneys were ineffective and inexperienced, Babcock told the Chronicle, resulting in harm to Leal in both the guilt or innocence and the penalty phases of his trial. According to Babcock,

they failed to challenge the prosecution "junk science" and flawed DNA evidence or to present expert testimony on Leal's learning disabilities and brain damage. Leal, sentenced to death for the 1994 rape and murder of a 16-year-old girl, was then 21 and had no criminal record.

Also, there is no dispute that this treaty is the law. In 2003, Mexico filed suit against the U.S., claiming that 51 Mexican nationals sentenced to death in U.S. courts had been denied consular access. (Leal was one of them.) In 2004, the International Court of Justice ruled that the U.S. must review these individuals' cases. The issue was finally resolved, in 2008, by the U.S. Supreme Court, which unanimously supported the ICJ decision but ruled that it was up to Congress to implement it.

That is what Senate Judiciary Committee Chairman Patrick Leahy addressed last week, when he introduced legislation to allow federal courts to review such cases, and to increase compliance and provide remedies.

And finally, as Leahy eloquently stated, the U.S. failure to honor its treaty obligations "undercuts our ability to protect Americans abroad and deeply damages our image as a country that abides by its promises and the rule of law. It would also be completely unacceptable to us if our citizens were treated in this manner."

For all of these reasons, we urge Congress to act swiftly to pass this legislation, and we urge Gov. Perry to give Leal, and others in his situation, the time to benefit from its remedies if they are shown to have been harmed.

PERRY, UTAH

Mr. HATCH. Mr. President, I rise today to pay tribute to the great city of Perry, UT, on the 100th anniversary of its incorporation.

Today, Perry is a beautiful city of nearly 4,000 residents nestled at the foot of northern Utah's majestic Wasatch Mountains. Its fame and acclaim are extensive for a variety of reasons.

First, it is the apple of many a person's eye because of its location on Utah's famed Fruit Way. Its fruit stands along highway 89 are laden with apples, cherries, apricots, peaches, pears and other produce. I have never found any fruit nearly so sweet in all my travels.

Perry is also home to the legendary Maddox Ranch House, where succulent steaks, fried chicken, homemade rolls and other fare have been food for thought and the palate for locals and many a weary traveler—this Senator, included—for more than six decades.

Best of all, though, are the wonderful residents of Perry. I have always been unfailingly impressed with their work ethic and civic-mindedness their eagerness and willingness to pitch in and build a better future and community for their children and grandchildren.

They also are warm and welcoming. Whenever people pop in, they never seem to be put out. It has been my experience that they are always eager to lend a hand or extend the hand of friendship. I always feel better for being there. It doesn't hurt that my wife Elaine hails from nearby Newton.

It's little wonder that every time I am in Perry I feel right at home.

Great places like Perry don't just happen. It takes vision and hard work—a trait Orrin Porter Rockwell and his brother Merritt undoubtedly had in abundance when they laid claim to a piece of land in the area adjacent Porter Spring. They were followed in 1851 by the Mormon pioneers, settlers of faith and fortitude who befriended the Native Americans there and founded what became known as Three Mile Creek.

Many milestones have come and gone since then. In 1861 the first school was built, followed by the groundbreaking for the Northern Utah Railroad 10 years later. And the settlers also weathered some adversity, including harsh winters and the Great Flood of 1896. Two years later, Three Mile Creek was renamed Perry in honor of Orrin Alonzo Perry, who served as an LDS bishop there for more than two decades.

June 19, 1911, the date of Perry's incorporation, was another major event and marked a new beginning. Over the ensuing years, the people of Perry, under the guidance of some remarkable and visionary leaders, kept right on building, bringing electricity, drinking water, a town hall and more schools to the city. Just this year, Perry added a wastewater treatment plant and a soccer park to the mix. And I trust many more chapters remain to be written in Perry's illustrious history.

As Perry celebrates its centennial over the Fourth of July weekend, I salute its visionary and hardworking citizens, both past and present, who have made the city what it is today. I am sure Orrin Porter Rockwell and Orrin Alonzo Perry would be proud. You can be certain that this Orrin is.

EXPLOITING GAPS IN U.S. GUN LAWS

Mr. LEVIN. Mr. President, I have long sought to bring attention to the dangerous gaps in U.S. gun laws, hoping the exposure would lead to the passage of commonsense firearm legislation. To those of us who feel that Congress can and should play a role in protecting American neighborhoods from the scourge of gun violence, enacting laws to ensure firearms stay out of the hands of dangerous people seems like a no-brainer. Unfortunately, the National Rifle Association, despite broad support for sensible gun safety laws among Americans across the political spectrum, has successfully blocked much-needed legislative changes.

Recently a startling new voice joined the discussion highlighting the weaknesses in our gun laws, most notably how we administer firearm background checks. Consider the following quote describing the so-called gun show loophole:

> America is absolutely awash with easily obtainable firearms. You can go down to a gun show at the local convention center and come away with a fully automatic assault rifle without a background check and, most likely, without having to show an identification card.

While this quote does not break any new ground regarding the dangers of the gun show loophole, it is noteworthy because of the person who said it. These were not the words of a Member of Congress, advocating for legislation, nor were they the words of a spokesperson of groups like Mayors Against Illegal Guns or the Brady Campaign. This quote is taken from an Internet video message recorded by Adam Gadahn, an American born, confirmed al-Qaida operative.

In the video, Gadahn speaks to al-Qaida followers and sympathizers, describing the ease with which a person can purchase a firearm from a private seller without a background check, often with no questions asked. In fact, this video is not merely a description of the loopholes in U.S. gun laws, it is an exhortation to would be terrorists to exploit these loopholes and kill innocent Americans. To wit, the video ends with Gadahn asking his viewers, "What are you waiting for?"

This video is a chilling reminder that dangerous loopholes exist in U.S. gun laws, weaknesses that terrorists are actively trying to exploit. While Gadahn is not entirely accurate—a person cannot purchase a "fully automatic assault" rifle at a gun show without government knowledge—he correctly describes just how simple it is for dangerous individuals to acquire deadly weapons in the United States, including semi-automatic assault rifles.

I urge my colleagues to take up and pass two gun safety bills introduced by Senator FRANK LAUTENBERG: the Gun Show Background Check Act, S. 35, which would close the loophole that makes it easy for criminals, terrorists and other prohibited buyers to evade background checks and buy guns from private citizens at gun shows; and the Denying Firearms and Explosives to Dangerous Terrorists Act, S. 34, which would close the loophole in Federal law that hinders the ability of law enforcement to keep firearms out of the hands of terrorists by authorizing the Attorney General to deny the sale of a firearm when a background check reveals that the prospective purchaser is a known or suspected terrorist.

Congressional action should not require such stark evidence that al Qaida and like-minded criminals are trying to use weak U.S. gun laws to carry out terrorist attacks against Americans. But the evidence—clear, explicit and terrifying—is here nonetheless. The time to act is long overdue.

UTAH SHAKESPEARE FESTIVAL

Mr. HATCH. Mr. President, today I wish to pay tribute to the Utah Shakespeare Festival, the Nation's premier regional theater and one of our State's crown jewels, on the occasion of its 50th anniversary.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-41,743-03

EX PARTE HUMBERTO LEAL[1]

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. 1994-cr-4696-W3 IN THE 186th DISTRICT COURT BEXAR COUNTY

Per Curiam. **PRICE, J., filed a concurring statement in which JOHNSON and ALCALA, JJ., join. KEASLER, J., filed a concurring statement in which MEYERS, J., joins. HERVEY and COCHRAN, JJ., not participating.**

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In July 1995, a jury convicted applicant of the offense of capital murder. The jury

[1] To date, all pleadings concerning this defendant have been filed under the name "Humberto Leal" or "Humberto Leal, Jr." In this subsequent application, counsel has styled the pleading "Humberto Leal Garcia." For consistency of our records, the Court will continue to use the designation "Humberto Leal" to refer to the defendant/applicant.

answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Leal v. State*, No. AP-72,210 (Tex. Crim. App. Feb. 4, 1998)(not designated for publication).

In September 1997, applicant filed in the trial court his initial post-conviction application for writ of habeas corpus. This Court denied applicant relief. *Ex parte Leal*, No. WR-41,743-01 (Tex. Crim. App. Oct. 20, 1999)(not designated for publication). Applicant filed his first subsequent application in the trial court in March 2005. This Court dismissed that application because it failed to meet the dictates of Article 11.071, § 5. *Ex parte Leal*, No. WR-41,743-02 (Tex. Crim. App. Mar. 7, 2007)(not designated for publication). This, his second subsequent application, was filed in the trial court on June 23, 2011.

In this application, applicant asserts that (1) he is a Mexican national; (2) his right to consular notification was violated, therefore, the International Court of Justice's decision in the *Case Concerning Avena and other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. No. 128 (Judgment of Mar. 31), entitles him to a new review of his case; and (3) his imminent execution should be stayed pending passage of legislation regarding procedures on how to implement this review, which legislation is currently pending in Congress. We have reviewed the application and find that applicant has failed to meet the requirements of Article 11.071, § 5. Accordingly, we dismiss his application.

Applicant alternatively argues that we should consider his application under our original habeas jurisdiction or reconsider the claim under one of his previously filed Article 11.071 applications. This we decline to do. Applicant's motion for stay of execution is denied.

IT IS SO ORDERED THIS THE 27th DAY OF JUNE, 2011.

Do Not Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-41,743-03

EX PARTE HUMBERTO LEAL, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 1994-CR-4696-W3 IN THE 186TH DISTRICT COURT BEXAR COUNTY

PRICE, J., filed a concurring statement in which JOHNSON and ALCALA, JJ., joined.

CONCURRING STATEMENT

There is no dispute that allowing the applicant's execution to go forward without first affording him a hearing in satisfaction of the International Court of Justice's judgment in the *Avena* case,[1] would violate the United States's treaty obligations under the Vienna

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[1] *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).

Convention on Consular Relations,[2] the Optional Protocol,[3] and Article 94 of the United Nations Charter[4]—obligations that are binding on Texas by way of the Supremacy Clause of the United States Constitution.[5] The United States Supreme Court has acknowledged as much, while holding that the various treaty provisions that bind the United States to comply with an ICJ decision are not self-executing, and thus require legislation for their implementation.[6] To date, no such legislation has passed. Lamentably, the applicant finds himself in possession of an apparent right under international law without an actual remedy under domestic law.[7]

To satisfy the requirements of Article 11.071, Section 5(a)(1),[8] justifying a subsequent application for writ of habeas corpus and a stay of execution, the applicant invokes proposed

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[2] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[3] Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, Art.I, 21 U.S.T. 326, T.I.A.S. No. 6820.

[4] U. N. Charter art. 94, para. 1.

[5] U. S. CONST. art. VI, cl. 2.

[6] 552 U.S. 491 (2008).

[7] *See Medellin v. Texas*, 554 U.S. 759, 763-64 (2008) (Breyer, J., dissenting) (observing that, in earlier *Medellin* opinion, "this Court, while recognizing that the United States was bound by treaty to follow the ICJ's determination as a matter of *international* law, held that that determination did not *automatically* bind the courts of the United States as a matter of *domestic* law.").

[8] TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1).

legislation that was introduced two weeks ago in Congress that would obligate the federal courts (but not state courts) to conduct the kind of hearing that the *Avena* case mandates before he may be executed consistent with our treaty obligations. Though this is apparently the third time implementing legislation has been introduced in Congress, the applicant's experts assure us that the current bill enjoys widespread bipartisan support as well as the support of the Executive Branch. Even so, the legislative process being what it is, the bill is not likely to pass until the end of this calendar year at the earliest. I agree with the Court that *pending* legislation constitutes neither new law nor new facts—at least not new facts entitling the applicant to *relief*—in contemplation of Article 11.071, Section 5(a)(1).

The applicant asks us, alternatively, to treat his application as an original writ application, unhindered by the restraints of Article 11.071. But the application seeks relief from a capital conviction and/or punishment, and it is my understanding that "Article 11.071 presently provides the exclusive procedure for the exercise of this Court's original habeas jurisdiction when the applicant seeks relief from a judgment imposing a penalty of death."[9] Nor does the nascent legislation create a compelling enough reason to reopen the applicant's initial writ application, as we did in *Ex parte Moreno*.[10] In my view, the applicant currently lacks a basis for a remedy in our state courts in Texas.

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[9] *Ex parte Alba*, 256 S.W.3d 682, 698 (Tex. Crim. App. 2008) (Price, J., dissenting).

[10] 245 S.W.3d 419, 428-29 (Tex. Crim. App. 2008).

This does not mean he lacks any state remedy at all. The Executive Department has the power, unfettered as ours is, to grant the applicant a reprieve.[11] And it is precisely when the Judicial Department proves institutionally unequal to the task that the exercise of executive clemency is most appropriate. With the recommendation of the Board of Pardons and Paroles, the Governor may effectively stay the applicant's execution until such time as legislation passes that finally implements our indisputable treaty obligations and provides a remedy for the applicant's right under international law.[12] By himself, the Governor can grant one thirty-day reprieve, affording the trial court an opportunity to delay re-imposition of sentence until such time as implementing legislation may pass.[13] In this way, Texas can still honor its duty under the Supremacy Clause to honor the treaty obligations of the United States, just as Justice Stevens has implored us to do.[14]

With these comments, I regretfully concur in the Court's order.

FILED: June 27, 2011
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[11] TEX. CONST. art. 4, § 11.

[12] *Id.*

[13] *Id.*

[14] *See Medellin v. Texas*, *supra*, at 536 (Stevens, J., concurring) ("One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy.").

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-41,743-03

EX PARTE HUMBERTO LEAL, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO.1994-CR-4696-W3 IN THE 186TH DISTRICT COURT BEXAR COUNTY

KEASLER, J., filed a concurring statement in which MEYERS, J., joined.

CONCURRING STATEMENT

I join in the Court's decision to deny Humberto Leal's application to stay his execution scheduled for Thursday, July, 7, 2011, and to dismiss his second subsequent application under Texas Code of Criminal Procedure Article 11.071 Section 5.

In his application for a stay of execution and application for habeas relief Leal raises three basic points. First, he argues that the Consular Compliance Act, which has been introduced in the United States House by Senator Patrick Leahy, would require that Leal receive review and reconsideration of his conviction and sentence under the International Court of Justice's (ICJ's) *Avena* decision. And second, Leal contends that he is entitled to

habeas review because the Inter-American Commission on Human Rights (IACHR) has concluded that Leal's case was prejudiced by the Vienna Convention Violation. We have previously determined that analogous arguments did not meet the requirements of Section 5 when they were raised by Jose Ernesto Medellin in his second subsequent state application for a writ of habeas corpus.

Pending legislation is not the law, and any argument that the Consular Compliance Act will be passed by Congress and signed into law by the President is purely speculative. We are bound to follow the law as it is and, at this time, there is nothing that makes the *Avena* decision binding law.[1] Next, Leal cites no authority and fails to explain how the IACHR's determination is binding on this Court or any other court in the United States.

Leal also complains that his execution would violate his right to free speech and to petition Congress to enforce *Avena*. But Leal has not established that his execution, pursuant to a valid death sentence, presents an unreasonable restriction on these rights. Because the "Consular Compliance Act" is not the law, it cannot legitimately be used as support for this argument. In this instance, the State's right to finality trumps the rights Leal asserts.

There is nothing in the United States Constitution that prohibits the State from proceeding with Leal's execution. Leal has failed to show that his current claims meet the

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[1] *See Medellin v. Texas*, 554 U.S. 759, 759-760 (2008) (denying request for stay of execution because the possibility that the Congress or Texas Legislature would pass legislation giving effect to *Avena* was "too remote to justify an order from this Court staying the sentence imposed by the Texas courts."); *Foster v. Neilson*, 27 U.S. 253, 315 (1829) ("Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject.").

requirements of Section 5.[2] As a result, I agree with denial of his motion to stay and the dismissal of Leal's second subsequent habeas application.

DATE FILED: June27, 2011
DO NOT PUBLISH

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[2] *See e.g., Ex parte Medellin*, 223 S.W.3d 315, 349-52 (Tex. Crim. App. 2006).

AMICUS CURIAE BRIEF

Nos. 11A1, 11A2

IN THE SUPREME COURT OF THE UNITED STATES

HUMBERTO LEAL GARCIA, AKA HUMBERTO LEAL, APPLICANT

v.

STATE OF TEXAS

(CAPITAL CASE)

ON APPLICATIONS FOR A STAY OF EXECUTION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPLICATIONS FOR A STAY

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IN THE SUPREME COURT OF THE UNITED STATES

Nos. 11A1, 11A2

HUMBERTO LEAL GARCIA, AKA HUMBERTO LEAL, APPLICANT

v.

STATE OF TEXAS

(CAPITAL CASE)

ON APPLICATIONS FOR A STAY OF EXECUTION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPLICATIONS FOR A STAY

The Solicitor General, on behalf of the United States, respectfully files this brief as amicus curiae in support of the applications for a stay of execution. The imminent execution of petitioner would place the United States in irreparable breach of its international-law obligation to afford petitioner review and reconsideration of his claim that his conviction and sentence were prejudiced by Texas authorities' failure to provide consular notification and assistance under the Vienna Convention on Consular Relations. This Court has made clear that Congress has the constitutional authority to provide a federal remedy that would bring the United States into compliance with its international

legal obligation. Legislation has been introduced in the United States Senate, with the full support of the Executive Branch, to achieve this objective. The Attorney General and the Secretary of State have submitted a joint letter to the Chairman of the Senate Judiciary Committee attesting to the government's strong support for the legislation.

Ensuring that the United States complies with its international obligations regarding consular notification and access serves vital national interests. These interests include protecting Americans abroad, fostering cooperation with foreign nations, and demonstrating respect for the international rule of law. The recently introduced Senate bill that would bring the United States into compliance, however, cannot be enacted before petitioner's scheduled July 7, 2011, execution date. To permit Congress a reasonable period in which to act on the bill, a stay of execution until the adjournment of the current session of Congress (which must occur by January 3, 2012) is therefore warranted. This Court has authority to grant a stay under the All Writs Act, 28 U.S.C. 1651, and doing so would accord with the Court's traditional standards and serve compelling national interests.[1]

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[1] Petitioner has also filed a petition for a writ of certiorari (No. 11-5001) and a petition for an original writ of habeas corpus (No. 11-5002). This brief is not being filed in support of those petitions. Rather, as explained at pp. 22-23, infra, the grant of a stay is appropriate in aid of this Court's future jurisdiction to review the judgment in a proceeding under the Consular Notification Compliance Act of 2011, S. 1194, 112th

STATEMENT

1. In 1969, the United States ratified the Vienna Convention on Consular Relations (Vienna Convention), done Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 of the Convention obligates states to inform a detained foreign national that he may receive the assistance of his country's consulate and to notify the consulate and allow access if the individual so requests. 21 U.S.T. 100-101, 596 U.N.T.S. 292-294.

In 1969, the United States also ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), done Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. See 21 U.S.T. 77, 700 U.N.T.S. 368. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." 21 U.S.T. at 326, 596 U.N.T.S. at 488.[2] In addition, Article 94 of the Charter of the United Nations (U.N. Charter), 59 Stat. 1051, another Treaty ratified by the United States, provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

Cong. (June 14, 2011), a bill currently pending in the Senate.

[2] In 2005, the United States withdrew from the Optional Protocol. See Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005), http://www.state.gov/documents/organization/87288.pdf.

In Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) (Avena), the International Court of Justice (ICJ) determined that the United States had violated Article 36 of the Vienna Convention by failing to inform 51 Mexican nationals, including petitioner, of their Vienna Convention rights, and by failing to notify consular authorities of the detention of 49 Mexican nationals, including petitioner. Id. at 71 ¶ 153. The ICJ determined that the appropriate remedy for those violations "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of [affected] Mexican nationals." Id. at 72 ¶ 153. The court stated that review and reconsideration should occur through a judicial process, id. at 65-66 ¶¶ 140-141, that the relevant inquiry in that process would be whether the treaty violation caused actual prejudice to the defendant, id. at 60 ¶ 121, and that procedural-default rules could not bar that review, id. at 57 ¶ 113.

In 2005, President George W. Bush determined that the United States would discharge its international-law obligations under Avena by "having State courts give effect" to Avena in the cases, including petitioner's, that were addressed in that decision. Medellin v. Texas, 552 U.S. 491, 503 (2008) (Medellin II). In Medellin II, however, this Court held that "neither Avena nor the President's Memorandum constitutes directly enforceable federal law

that pre-empts state limitations on the filing of successive habeas petitions." Id. at 498-499. The Court recognized that "the ICJ's judgment in Avena creates an international-law obligation on the part of the United States," id. at 522, and it observed that Congress could give that judgment domestic effect "through implementing legislation," id. at 520.

2. Petitioner is a Mexican national who has resided in the United States since he was two years old. In 1995, he was convicted of capital murder in a Texas state court and was sentenced to death for kidnapping, raping, and murdering a 16-year-old girl. The prosecution's evidence at his trial included two incriminating statements he made to the police during non-custodial interviews on the day of the murder. See Leal v. Dretke, Civ. No. SA-99-CA-1301-RF, 2004 WL 2603736, at *2-*7 (W.D. Tex. Oct. 20, 2004), certificate of appealability denied, 428 F.3d 543 (5th Cir. 2005), cert. denied, 547 U.S. 1073 (2006).

While his direct appeal was pending, petitioner notified the Mexican government of his conviction and sentence. He did not, however, raise any claim related to the violation of the Vienna Convention. See Leal v. Quarterman, Civ. No. SA-07-CA-214-RF, 2007 WL 4521519, at *3 (W.D. Tex. Dec. 17, 2007), aff'd in part and vacated in part, 573 F.3d 214 (5th Cir. 2009). The Texas Court of Criminal Appeals affirmed his conviction, Leal v. State, No. 72,210

(Feb. 4, 1998) (en banc), and this Court denied certiorari, 525 U.S. 1148 (1999).

3. Petitioner sought habeas corpus relief in state court, claiming, among other things, that Texas's failure to afford him consular notification and access required suppression of the incriminating statements he made to the police. The Texas trial court rejected that claim on the merits, finding that because petitioner was not in custody at the time he was interviewed by the police, Vienna Convention obligations were not triggered and, accordingly, his statements were not obtained in contravention of the Vienna Convention. Ex parte Leal, No. 94-CR-4696-W1, slip op., at 68 (Tex. 186th Dist. Ct. Apr. 23, 1999). The Texas Court of Criminal Appeals likewise denied relief based on the trial court's findings and its own review. Ex parte Leal, No. WR-41,743-01 (Tex. Crim. App. Oct. 20, 1999).

Petitioner then sought federal habeas corpus relief. His petition was based on ineffective assistance of trial counsel; he did not assert any claims based on the Vienna Convention. See Leal v. Dretke, 2004 WL 2603736, at *1. The district court denied relief, see id. at *10-*20, and the court of appeals denied a certificate of appealability, 428 F.3d 543 (5th Cir. 2005), cert. denied, 547 U.S. 1073 (2006).

4. Following the ICJ's decision in Avena, petitioner filed a second petition for state habeas corpus relief, arguing that

Avena -- and President Bush's Memorandum directing its implementation -- obligated the state courts to provide judicial review and reconsideration of his defaulted Vienna Convention claim. The Texas Court of Criminal Appeals summarily denied the petition, Ex parte Leal, No. WR-41,743-02, 2007 WL 678628 (Mar. 7, 2007), and, after the decision in Medellin II, this Court denied certiorari, 552 U.S. 1295 (2008).

Thereafter, petitioner filed a second federal habeas corpus petition, again relying on Avena and the President's determination to implement it through review and reconsideration in the state courts. The district court dismissed the petition as second or successive. Leal v. Quarterman, 2007 WL 4521519, at *4-*5; see 28 U.S.C. 2244(b)(3). Despite determining that it was required "to dismiss [the petition] without prejudice for lack of jurisdiction," id. at *5, however, the court went on to find "no arguable merit" to petitioner's claim that he had sustained "actual prejudice" within the meaning of Avena as a result of the Vienna Convention violation, id. at *7. Conducting what it described as the judicial review and reconsideration required by Avena, the court stated that there was "little the Mexican government could have done to aid petitioner's trial counsel." Id. at *17.

The court of appeals affirmed in part and vacated in part. Leal Garcia v. Quarterman, 573 F.3d 214 (5th Cir. 2009). The court held that the petition was not "second or successive" under Section

2244 because it was based on the President's Memorandum implementing Avena, which was not available while the first federal habeas petition was pending. Id. at 223-224. The court of appeals nevertheless dismissed the petition with prejudice based on this Court's intervening decision in Medellin II, although it observed that petitioner could file another petition in the event that Congress passed legislation requiring state compliance with Avena. Id. at 224 & n.54. Finally, the court of appeals vacated the district court's analysis of whether petitioner had been prejudiced by the Vienna Convention violation, explaining that "the district court's determination [was] based on its erroneous assumption of hypothetical jurisdiction." Id. at 216 n.4, 224-225.

5. On June 14, 2011, after extensive consultation with the Department of State and the Department of Justice, Senator Leahy introduced the Consular Notification Compliance Act of 2011 (CNCA), S. 1194, 112th Cong. (App., infra, 1a-9a), in the United States Senate. The bill provides that, "[n]othwithstanding any other provision of law, a Federal court shall have jurisdiction to review the merits of a petition claiming a violation of Article 36(1)(b) or (c) of the Vienna Convention * * * , filed by an individual convicted and sentenced to death by any Federal or State court." CNCA § 4(a)(1). It also requires the district court to grant a stay of execution if necessary to consider such a petition, CNCA § 4(a)(2), and it provides that no petition filed within a year of

the enactment of the bill "shall be considered a second or successive habeas corpus application or subjected to any bars to relief based on pre-enactment proceedings," CNCA § 4(a)(5). To obtain relief, the petitioner must make a showing of "actual prejudice to [his] criminal conviction or sentence as a result of the violation." CNCA § 4(a)(3). The Secretary of State and the Attorney General have jointly written to Senator Leahy to express the Executive Branch's strong support for the CNCA. See Letter from Hillary Rodham Clinton, Secretary of State, and Eric H. Holder, Jr., Attorney General, to Senator Patrick J. Leahy (Jun. 28, 2011) (State/Justice Letter) (App., infra, 10a-12a).

6. Petitioner is scheduled to be executed on July 7, 2011. On June 16, he filed a motion under Federal Rule of Civil Procedure 60(b) to reopen the judgment dismissing his federal habeas petition; he also sought a stay of execution. Leal Garcia v. Thaler, Civ. No. SA-07-CA-214-OG, 2011 WL 2479868 (W.D. Tex. June 21, 2011). He argued that the reopening and stay were justified based on the introduction of the CNCA in the Senate. The district court dismissed the Rule 60(b) motion, treating it as a successive habeas corpus petition because the court of appeals had previously denied petitioner's Vienna Convention claim on the basis of Medellin II. Id. at *6-*7. The court also denied a stay, noting that "[t]he filing of proposed legislation which might one day afford petitioner a remedy in the state or federal courts does not,

standing alone, justify a stay of execution." Id. at *8. The court observed that, in Medellin v. Texas, 554 U.S. 759 (2008) (per curiam) (Medellin III), this Court had denied a stay of execution based on such a claim, in the absence of any representation by the Executive Branch that there was a likelihood of action on the proposed legislation. 2011 WL 2479868 at *8. The district court concluded that petitioner's bare assertions about the likelihood of the legislation's enactment were too speculative to warrant the issuance of a stay in the absence of any "genuine progress" toward "actual passage" of the legislation. Id. at *8-*9.

In addition, on June 16, petitioner filed a third federal habeas corpus petition and motion for a stay of execution, relying on the introduction of the CNCA in the Senate. Leal Garcia v. Thaler, Civ. No. SA-11-CA-82-OG, 2011 WL 2479912 (W.D. Tex. June 22, 2011). The district court dismissed the petition, without prejudice, as "plainly without arguable merit" under Rule 4 of the Rules Governing Section 2254 Cases, on the ground that "the filing of a legislative proposal in the form of a bill is of no legal consequence" and provides "no arguable legal basis for federal habeas corpus relief." Id. at *16. The district court also denied petitioner's stay motion for the reasons that it had denied petitioner's stay request in connection with his Rule 60(b) motion, id. at *17-*19, and denied a certificate of appealability, id. at *21.

The court of appeals also denied a certificate of appealability and petitioner's request for a stay of execution. Leal Garcia v. Thaler, No. 11-70022, slip op. (5th Cir. June 30, 2011) (per curiam). The court concluded that reasonable jurists would not disagree with the district court's conclusion that petitioner does not have "a due process right to remain alive until the proposed Avena legislation becomes law." Id. at 6. It further determined that the "pure speculation of future legislation that could aid [petitioner] in some way does not give rise to a substantial claim upon which [a stay of execution] may be granted." Id. at 9.

7. On June 23, petitioner sought state habeas corpus relief and a stay of execution in light of the pendency of the CNCA. On June 27, the Texas Court of Criminal Appeals denied the petition and denied a stay. Ex parte Leal, No. WR-41,743-03. Justice Price concurred, joined by Justices Johnson and Alcala, observing that petitioner "finds himself in possession of an apparent right under international law" but without a judicial remedy under Texas law. Ibid.

ARGUMENT

This case implicates United States foreign-policy interests of the highest order. Indeed, this Court has recognized those interests to be "plainly compelling." Medellin II, 552 U.S. at 524. Petitioner's execution would cause irreparable harm to those

interests by placing the United States in irremediable breach of its international-law obligation, imposed by the ICJ's judgment in Avena, to provide judicial review of petitioner's Vienna Convention claim. That breach would have serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico, and the ability of American citizens traveling abroad to have the benefits of consular assistance in the event of detention.

Efforts on the part of Congress and the Executive Branch to satisfy the United States' obligation under Avena have resulted in the recent introduction in the Senate of the Consular Notification Compliance Act (CNCA). The CNCA would provide petitioner the procedural remedy that the United States is obligated to provide under international law: review and reconsideration of his Vienna Convention claim. The CNCA is currently under active consideration in Congress; the Chairman of the Senate Judiciary Committee has announced his intent to hold a hearing on the bill in July. App., infra, 16a. The Executive Branch participated in the development of the legislation and the Secretary of State and the Attorney General have publicly expressed their strong support for its enactment. See State/Justice Letter, App., infra, 10a-12a. That support distinguishes this case from Medellin III, in which this Court held that the possibility of enactment of a previous bill was "too remote" to warrant the issuance of a stay, in the absence of

any statement from the Executive Branch about the likelihood of Congressional action. 554 U.S. at 759-760; see id. at 760 ("The Department of Justice of the United States is well aware of these proceedings and has not chosen to seek our intervention."). While enactment of the Senate bill cannot be assured, in developing and advancing this legislation, the political branches, acting in coordination, have made greater efforts to achieve compliance with Avena than at any previous time.[3]

Given these circumstances -- petitioner's imminent execution date, the breach of United States' legal obligations that will ensue, the significant and detrimental foreign-policy consequences that will follow from such a breach, and the pendency of legislation that would avert those harms -- the Court should stay petitioner's execution until the adjournment of the current session of Congress (which must occur no later than January 3, 2012) in order to allow the United States additional time to meet its international-law obligations. The exercise of this Court's discretion to grant such a stay is consistent with the equitable

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[3] Senator Leahy introduced an amendment to address Avena in the FY 2011 Department of State, Foreign Operations, and Related Programs Appropriations Act, S. 3676, § 7082 (July 29, 2010). That amendment, however, did not have the full support of the Executive Branch, and it failed to move forward when negotiations over the budget reached impasse in the fall of 2010. That earlier effort provides no basis for assessing the prospects of the CNCA, which was carefully crafted through extensive executive-congressional discussions, is slated for a hearing, and enjoys high-level executive support.

principles that have guided this Court's decisions with respect to stays of execution.

Ordinarily, for the Court to grant a stay in a capital case, "there must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation and internal quotation marks omitted). In this case, those factors must be tailored to the basis for the requested stay, i.e., the introduction of legislation in Congress would, if enacted, afford petitioner the review and reconsideration that the United States has an undisputed international-law obligation to provide. The application of the traditional stay factors in this context must consider whether petitioner would have a right to federal-court review and a stay of execution under the legislation that has been introduced; whether petitioner -- and vital national interests -- would be irreparably harmed by denial of a stay; whether the grant of the stay would cause significant harm to the State of Texas; and what impact the grant or denial of a stay would have on the public interest. See Nken v. Holder, 129 S. Ct. 1749, 1756 (2009). Those stay factors are addressed to this Court's discretion. Id. at

1760-1761. Here, consideration of those factors justifies the exercise of the Court's discretion to grant a stay.

1. Congress's enactment of the CNCA would provide petitioner with the procedural right to federal-court review of his Vienna Convention claim. The United States has consistently acknowledged that it has a treaty-based obligation to provide that procedural right under Avena. See Gov't Br. at 38, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928) (Medellin I) ("[T]he United States has an international obligation under Article 94 [of the United Nations Charter] to comply with the Avena decision."); Medellin II, 552 U.S. at 504 ("No one disputes that the Avena decision -- a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes -- constitutes an international law obligation on the part of the United States.") (emphasis omitted). Under Avena, the United States is required to provide review and reconsideration of the convictions and sentences of the affected Mexican nationals in the decision, including petitioner, because of the United States' failure to provide required information about consular notification and assistance. Medellin II, 552 U.S. at 502-503. Avena requires such review without regard to any state procedural-default rules. Id. at 503.

In 2005, President Bush acknowledged the international legal obligation created by Avena and determined that the United States

would discharge that obligation by "having State courts give effect" to Avena in the cases, including petitioner's, that were addressed in that decision. Medellin II, 552 U.S. at 503. That determination reflected the President's considered judgment that the United States' foreign-policy interests in meeting its international obligations and protecting Americans abroad required the United States to comply with the ICJ's decision. In Medellin II, the United States reaffirmed the important interests implicated by its compliance with Avena, including "(1) the importance of securing reciprocal protection of Americans detained abroad; (2) the need to avoid harming relations with foreign governments, including Mexico; and (3) the interest in reinforcing the United States' commitment to the rule of law." U.S. Amicus Br. at 11, Medellin II, supra (No. 06-984). This Court agreed that the government's interests in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law * * * are plainly compelling." Medellin II, 552 U.S. at 524. Protecting those compelling interests is a sufficiently important matter to warrant this Court's intervention. See Medellin III, 554 U.S. at 761-762 (Stevens, J., dissenting) (noting that the importance of the interests at stake warranted granting a stay and calling for the views of the Solicitor General); id. at 762 (Souter, J., dissenting) (same); id. at 762-

763 (Ginsburg, J., dissenting) (same); id. at 763-766 (Breyer, J., dissenting) (same).

2. The pendency of the CNCA in the Senate, with the full support of the Executive Branch, creates a sufficient likelihood of petitioner's receiving judicial review and reconsideration of his Vienna Convention claim to satisfy the first stay consideration, i.e., likelihood of success on the merits. The merits here consist of a procedural opportunity, not a right to a substantive outcome.

a. In Medellin II, this Court observed that "[t]he responsibility" for implementing the United States' international legal obligation to comply with Avena "falls to Congress." 552 U.S. at 525-526. In the immediate aftermath of Medellin II, a bill to implement the decision was introduced in the House of Representatives, see Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2008), but that bill was introduced without Executive Branch participation or consultation, and it was not enacted. Following that effort, the various interested Departments of the Executive Branch, working with Congress, painstakingly negotiated and developed legislation that would implement Avena, while balancing the interests in preserving the efficiency of criminal proceedings and protecting the integrity of lawful criminal convictions. The resulting bill, the CNCA, was introduced by Senator Leahy on June 14, 2011.

The Executive Branch has strongly endorsed the CNCA in a letter to Senator Leahy signed by the Secretary of State and the Attorney General. See State/Justice Letter, App., infra, 10a-12a. The letter explains that enactment of the CNCA is "essential" to the government's "ability to protect Americans overseas and preserve some of [its] most vital international relationships." Id. at 12a. On June 29, 2011, Senator Leahy reiterated the crucial importance of the CNCA "to ensuring the protection of Americans traveling overseas" and to restoring the Nation's "image as a country that abides by its promises and the rule of law." 157 Cong. Rec. S4215-S4216 (June 29, 2011). Noting that "productive discussions with Republicans and Democrats from both the House and Senate" have begun, Senator Leahy, "[a]s [C]hairman of the Senate Judiciary Committee, * * * announc[ed] that [he] intend[s] to hold a hearing on this critical issue in July." Id. at S4216.

The introduction of the CNCA, with the support of the Executive Branch, represents an important step by the political branches toward fulfilling the United States' international-law obligation to implement the Avena decision. The CNCA provides for judicial review and reconsideration, without regard to procedural-default rules, of the capital convictions and sentences of foreign nationals, such as petitioner, who did not receive timely consular notification. CNCA § 4(a)(1). The CNCA also provides that the district court must enter a stay if necessary to allow that review

to take place. CNCA § 4(a)(2). If and when enacted, the CNCA would therefore satisfy the United States' international-law obligation to comply with the Avena judgment for petitioner and other covered individuals. And it would give petitioner an enforceable legal right to judicial review of his Vienna Convention claim.

b. The right that petitioner would vindicate under the CNCA is an opportunity for judicial review and reconsideration. Neither Avena nor the CNCA would guarantee petitioner a particular outcome. That is because the international-law obligation is one of process, not result. Avena does not require the United States to grant relief for a consular notification violation; it requires only an opportunity for review and reconsideration through an adequate judicial process. Petitioner contends (11A1 Appl. 10-11) that he is likely to show that the Vienna Convention violation caused him prejudice. See also 11-5002 Pet. 25-32. A tribunal with jurisdiction to address that claim would evaluate petitioner's submission in light of the "overwhelming" evidence "at both phases of [petitioner's] capital murder trial." Leal v. Dretke,, 2004 WL 2603736, at *18. Under the CNCA, the court would conduct an evidentiary hearing, if necessary, before determining whether petitioner had shown "actual prejudice." CNCA § 4(a)(3). At this time, however, petitioner's likelihood of success at such a proceeding is not the relevant issue. A stay should instead turn

on the likelihood of petitioner's obtaining the procedural opportunity for review.

In Medellin III, the Court stated that a showing of prejudice (there, "that [the defendant's] confession was obtained unlawfully") would have to be "[t]he beginning premise for any stay." 554 U.S. at 760. The Court then noted that such a showing of unlawfulness "is highly unlikely as a matter of domestic or international law." Ibid. But a likelihood that petitioner would actually obtain relief by review and reconsideration should not be required in the present context. A stay is warranted to protect the United States' interest in adhering to the rule of international law in affording petitioner the hearing required by Avena. Execution of petitioner without compliance with Avena would produce a further breach of the United States' international-law obligations and gravely harm the United States' foreign-policy interests. Because the breach of those obligations would result from the United States' failure to provide petitioner review and reconsideration, the stay should turn, not on whether he can show a likelihood of prejudice to his trial or sentence, but on whether a sufficient likelihood exists that additional time would enable petitioner to receive the procedural remedy that Avena requires.

Significantly, petitioner has not yet received the judicial review and reconsideration of his claim that Avena requires. In petitioner's first state habeas proceeding, the court addressed

petitioner's Vienna Convention claim relating to his non-custodial statements, but it held that the Vienna Convention was not violated and, accordingly, it did not consider the issue of prejudice. Although the district court considering petitioner's second federal habeas petition opined that "there is no arguable merit to petitioner's claim that he sustained 'actual prejudice'" as a result of the Vienna Convention violation in his case, Leal v. Quarterman, Civ. No. SA-07-CA-214-RF, 2007 WL 4521519, at *7, it made that statement only after determining that it lacked jurisdiction, id. at *5, and the Fifth Circuit vacated that portion of its opinion, 573 F.3d 214, 224-225 (2009). A determination by a court that lacked jurisdiction does not satisfy Avena.

Review and reconsideration under the provisions of the CNCA would satisfy Avena. If petitioner receives that review, the United States will have discharged its obligations under Avena, even if petitioner fails to show actual prejudice. Conversely, if petitioner does not receive judicial review and reconsideration of his Vienna Convention claim, the United States will have violated its obligations, whether or not there was a reasonable possibility that petitioner could have shown prejudice. See Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2008 I.C.J. 311, ¶ 76 (July 16) (noting acknowledgment by the United States that if petitioner were "executed without the

necessary review and reconsideration required under the Avena Judgment, that would constitute a violation of United States obligations under international law").[4]

c. Because the CNCA has not yet been enacted, no currently pending case under the provisions of that bill exists. Nevertheless, the All Writs Act, 28 U.S.C. 1651, authorizes this Court to enter a stay to preserve its potential future jurisdiction. That statute provides in relevant part that "[t]he Supreme Court [and other federal courts] may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). It is well established that the Court's power under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966)

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[4] Although the United States has withdrawn from the Optional Protocol and is not subject to the jurisdiction of the ICJ for future alleged violations of the Vienna Convention, it is subject to the jurisdiction of the ICJ for enforcement of the original Avena decision. Accordingly, the execution of petitioner in violation of Avena could result in additional proceedings before the ICJ. Indeed, in June 2008, when Medellin's execution was impending, Mexico again took the United States before the ICJ, which entered provisional measures ordering the United States to take all necessary measures to ensure that Medellin was not executed. Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2008 I.C.J. 311, ¶¶ 76-80 (July 16). The court ultimately found that execution constituted a second violation. See Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 3, ¶¶ 41-46, 61(2) (Jan. 19).

(emphasis added); see Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984).

If the CNCA is enacted, petitioner can initiate review of his Vienna Convention claims in a federal district court. CNCA § 4(a)(1). He would then be statutorily entitled to a stay of execution, if necessary, "to allow the court to review [his] petition." CNCA § 4(a)(2) ("the court shall grant a stay of execution"). Should the decision in that proceeding be unfavorable to him, he will be able to appeal by obtaining a certificate of appealability upon a "substantial showing of actual prejudice to [his] criminal conviction or sentence * * * as a result of a violation of Article 36(1) of the Vienna Convention." CNCA § 4(a)(6)(B). And the decision of the court of appeals -- whether based on a consideration of the merits of an appeal or based on the denial of a certificate of appealability -- will be subject to review in this Court under 28 U.S.C. 1254(1). See Hohn v. United States, 524 U.S. 236 (1998). The All Writs Act permits this Court to grant a stay to protect that potential future jurisdiction.

d. Because the CNCA has not yet been enacted, existing domestic law does not afford petitioner a right to review and reconsideration.[5] But in determining whether a stay applicant has

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[5] Although the United States has an acknowledged international-law obligation to provide petitioner with judicial review of his Vienna Convention claim, and is supporting pending legislation providing for such review, under Medellin II, petitioner does not presently have a legal right to such review

shown a significant possibility of success, the Court may take into account the possibility of a change in the law. See, e.g., San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1303 (2006) (Kennedy, J., in chambers) (granting a stay in part because the case could be affected by a city ordinance whose validity was being litigated in state court). Indeed, the Court routinely does so when the possible change would result from a judicial decision in a pending case. See, e.g., California v. Hamilton, 476 U.S. 1301, 1302-1303 (1986) (Rehnquist, J., in chambers) (granting stay because "[o]ur decision in Rose v. Clark may well affect the outcome of the instant case"). So long as an applicant can show a reasonable possibility of a change in the law that will entitle him to relief, the source of the change is not relevant.

Because of the active and unequivocal support of the Executive Branch for the CNCA, this case is significantly different from Medellin III. In that case, Medellin sought to delay his execution so that either Congress or the Texas Legislature might have the opportunity to enact legislation implementing Avena and requiring domestic courts to provide review and reconsideration of his procedurally defaulted Vienna Convention claim. 554 U.S. at 759. This Court held that the possibility of enactment of legislation, which had "not progressed beyond the bare introduction of a bill,"

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that is enforceable in domestic courts. See 552 U.S. at 504-523.

was "too remote" to warrant issuance of a stay, where "neither the President nor the Governor of the State of Texas has represented to us that there is any likelihood of congressional or state legislative action." Id. at 759-760. Here, by contrast, the heads of the Departments of State and Justice have communicated to Congress the Executive Branch's full support for the legislation, emphasized its critical importance to United States interests, and urged Congress to enact it. The Executive Branch's active participation in the development of this legislation, and support for its enactment, make the possibility of Congressional action more likely, and therefore less "remote," than it was in Medellin III.

This case is therefore more akin to those in which the Court has exercised its discretion to stay its mandate in order to provide Congress with a reasonable opportunity to enact legislation in light of a judicial decision. See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 & n.40 (1982) (ordering a "limited stay" in order to "afford Congress an opportunity" to enact legislation that would "reconstitute the bankruptcy courts" in response to the Court's decision); Buckley v. Valeo, 424 U.S. 1, 142-143 (1976) (per curiam) (entering a stay to afford Congress an opportunity to reconstitute the Federal Election Commission). Those authorities suggest that, in circumstances affecting vital government interests, this Court may exercise its

discretion under the All Writs Act to maintain the status quo for a limited period in order to provide an opportunity for Congress to take necessary action.

3. Petitioner's execution would cause irreparable harm to important foreign-relations interests that this Court has described as "plainly compelling." Medellin II, 552 U.S. at 524. The execution would irremediably violate the United States' international-law obligation to comply with the ICJ's judgment in Avena. It would also violate the United States' specific commitments to the international community that it would work to give effect to that judgment. See Medellin III, 554 U.S. at 762-763 (Ginsburg, J., dissenting) (quoting representation by the United States that it continues to seek to give full effect to the Avena decision); Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 3, ¶ 61 (Jan. 19) (noting "the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the Avena Judgment" as well as "the undertakings given by the United States of America in these proceedings"). Those violations would cause irreparable harm to the foreign-policy interests of the United States.

Most immediately, petitioner's execution would result in serious damage to United States relations with Mexico. The United States' failure to comply with Avena has generated increasing

concern by the Mexican government and thus posed an ever-greater obstacle to United States-Mexican relations. Those relations are enjoying an unprecedented level of cooperation but they are also unusually sensitive, so that a breach resulting from petitioner's execution would be particularly harmful. As explained in a letter to the Secretary of State from the Mexican Ambassador, the United States' "continued non-compliance with the ICJ's decision has already placed great strain on [the] relationship" between the United States and Mexico. Letter from Arturo Sarukhan, Ambassador of Mexico, to Hillary Clinton, Secretary of State (Jun. 14, 2011) (App., infra, 13a). "[A] second execution in violation of the ICJ's judgment would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States" on important law-enforcement initiatives, "including extraditions, mutual judicial assistance, and our efforts to strengthen our common border." Id. at 14a; see State/Justice Letter, infra, 11a ("Continued non-compliance with Avena has become a significant irritant that jeopardizes other bilateral initiatives" between the United States and Mexico.).

Petitioner's execution would also harm relations between the United States and other countries and regional and multilateral institutions that "have repeatedly and forcefully called upon the United States to fulfill obligations arising from Avena." State/Justice Letter, App., infra, 11a. The European Union has

sent repeated inquiries to the United States about this issue in general, and petitioner's execution in particular. Other Nations, including the United Kingdom, have sent multiple communications that have raised the issue of Avena compliance at high levels. The European Union, Chile, El Salvador, Honduras, Switzerland, and Uruguay have similarly written the Governor of Texas to urge him to grant petitioner a reprieve to allow time for passage of legislation to implement Avena. See App., infra, 20a-31a. Cf. Crosby v. National Foreign Trade Council, 530 U.S. 363, 386 (2000) (noting that "repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes" with foreign powers can be sufficient to establish for purposes of preemption that a state's action interferes with the national government's "diplomatic objectives").

Perhaps most important, petitioner's execution could seriously undermine the ability of the United States Government to protect United States citizens who are detained in foreign countries. As the Attorney General and Secretary of State have explained, "[c]onsular assistance is one of the most important services that the United States provides its citizens abroad." State/Justice Letter, App., infra, 10a. In Fiscal Year 2010, United States consular officials assisted more than 3500 United States citizens who were arrested abroad and conducted more than 9500 prison visits. Consular assistance has proved essential to affording

needed assistance in several sensitive recent cases involving Americans detained in Egypt, Libya, Syria, Iran, and Pakistan, among other countries. Respecting international rules for consular notification is a matter of paramount importance for Americans detained overseas, as foreign nationals detained in the United States usually have a constitutional right to counsel, whereas United States citizens detained in many foreign countries do not. "The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States." Ibid. Compliance with those obligations is therefore essential in "ensuring that U.S. citizens detained overseas can receive critical consular assistance." Ibid. By contrast, failure to comply with Avena will weaken the force of the United States' insistence that other countries respect those rules; an internationally high-profile execution while remedial legislation is pending would greatly exacerbate that problem.

Finally, the interests served by affording Congress an opportunity to implement the United States' international-law obligations and to prevent the significant damage to the United States' foreign relations flowing from any further breach of those obligations outweigh the State's interest in the immediate enforcement of its judgment. In balancing the equitable principles that govern the issuance of a stay of execution, the Court has

recognized the "State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill v. McDonough, 547 U.S. 573, 584 (2006). But in this instance, the State's own conduct put the United States in breach of its international obligations, and the State had, and continues to have, the power to remedy that breach and to avoid a further violation in this case.[6] And the Court has recognized that the United States' interests in demonstrating that it respects the rule of law internationally, protecting its citizens who live or travel abroad, and preserving cooperation with Mexico and other nations are "plainly compelling." Medellin II, 552 U.S. at 524. Because the damage to those interests in the absence of a stay would be permanent and irreparable, as compared to the temporary disruption of the State's enforcement of its judgment that a stay would cause, the balance of equities favors a stay until the adjournment of the current session of Congress.

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[6] The Department of State Legal Adviser has written to the relevant authorities in Texas -- the Governor, the Attorney General, the District Attorney, and the Board of Pardons and Paroles -- to urge those officials to make all available efforts under Texas law to secure a continuation or modification of petitioner's execution date to afford Congress a reasonable time to enact legislation that would prevent a violation of the United States' international legal obligations. App., infra, 32a-43a. If Texas authorities take such action, the United States would promptly notify this Court.

CONCLUSION

The applications for a stay should be granted.

Respectfully submitted.

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JULY 2011

APPENDIX

112TH CONGRESS
1ST SESSION

S. 1194

To facilitate compliance with Article 36 of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 14, 2011

Mr. LEAHY introduced the following bill, which was read twice and referred to the Committee on the Judiciary

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A BILL

To facilitate compliance with Article 36 of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consular Notification Compliance Act of 2011".

SEC. 2. PURPOSE AND STATEMENT OF AUTHORITY.

(a) PURPOSE.—The purpose of this Act is to facilitate compliance with Article 36 of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, and

any comparable provision of a bilateral international agreement addressing consular notification and access.

(b) STATEMENT OF AUTHORITY.—This Act is enacted pursuant to authority contained in articles I and VI of the Constitution of the United States.

SEC. 3. CONSULAR NOTIFICATION AND ACCESS.

(a) IN GENERAL.—As required under, and consistent with, Article 36 of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, and any comparable provision of a bilateral international agreement addressing consular notification and access, if an individual who is not a national of the United States is detained or arrested by an officer or employee of the Federal Government or a State or local government, the arresting or detaining officer or employee, or other appropriate officer or employee of the Federal Government or a State or local government, shall notify that individual without delay that the individual may request that the consulate of the foreign state of which the individual is a national be notified of the detention or arrest.

(b) NOTICE.—

(1) IN GENERAL.—The consulate of the foreign state of which an individual detained or arrested is a national shall be notified without delay if the individual requests consular notification under sub-

section (a), and an appropriate officer or employee of the Federal Government or a State or local government shall provide any other consular notification required by an international agreement.

(2) FIRST APPEARANCE.—If an appropriate officer or employee of the Federal Government or a State or local government has not notified the consulate described in paragraph (1) regarding an individual who is detained pending criminal charges and the individual requests notification or notification is mandatory under a bilateral international agreement, notification shall occur not later than the first appearance of the individual before the court with jurisdiction over the charge.

(c) COMMUNICATION AND ACCESS.—An officer or employee of the Federal Government or a State or local government (including an officer or employee in charge of a facility where an individual who is not a national of the United States is held following detention or arrest) shall reasonably ensure that the individual detained or arrested is able to communicate freely with, and be visited by, officials of the consulate of the foreign state of which the individual detained or arrested is a national, consistent with the obligations described in section 2(a).

(d) NO CAUSE OF ACTION.—Nothing in this section is intended to create any judicially or administratively enforceable right or benefit, substantive or procedural, by any party against the United States, its departments, agencies, or other entities, its officers or employees, or any other person or entity, including, an officer, employee, or agency of a State or local government.

SEC. 4. PETITION FOR REVIEW.

(a) IN GENERAL.—

(1) JURISDICTION.—Notwithstanding any other provision of law, a Federal court shall have jurisdiction to review the merits of a petition claiming a violation of Article 36(1) (b) or (c) of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, or a comparable provision of a bilateral international agreement addressing consular notification and access, filed by an individual convicted and sentenced to death by any Federal or State court before the date of enactment of this Act.

(2) DATE FOR EXECUTION.—If a date for the execution of an individual described in paragraph (1) has been set, the court shall grant a stay of execution if necessary to allow the court to review a petition filed under paragraph (1).

(3) STANDARD.—To obtain relief, an individual described in paragraph (1) shall make a showing of actual prejudice to the criminal conviction or sentence as a result of the violation. The court may conduct an evidentiary hearing if necessary to supplement the record and, upon a finding of actual prejudice, shall order a new trial or sentencing proceeding.

(4) LIMITATIONS.—

(A) IN GENERAL.—A petition for review under this section shall be filed within 1 year of the later of—

(i) the date of enactment of this Act;

(ii) the date on which the Federal or State court judgment against the individual described in paragraph (1) became final by the conclusion of direct review or the expiration of the time for seeking such review; or

(iii) the date on which the impediment to filing a petition created by Federal or State action in violation of the Constitution or laws of the United States is removed, if the individual described in para-

graph (1) was prevented from filing by such Federal or State action.

(B) TOLLING.—The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward the 1-year period of limitation.

(5) HABEAS PETITION.—A petition for review under this section shall be part of the first Federal habeas corpus application or motion for Federal collateral relief under chapter 153 of title 28, United States Code, filed by an individual, except that if an individual filed a Federal habeas corpus application or motion for Federal collateral relief before the date of enactment of this Act or if such application is required to be filed before the date that is 1 year after the date of enactment of this Act, such petition for review under this section shall be filed not later than 1 year after the enactment date or within the period prescribed by paragraph (4)(A)(iii), whichever is later. No petition filed in conformity with the requirements of the preceding sentence shall be considered a second or successive habeas corpus application or subjected to any bars to relief based on pre-

enactment proceedings other than as specified in paragraph (3).

(6) APPEAL.—

(A) IN GENERAL.—A final order on a petition for review under paragraph (1) shall be subject to review on appeal by the court of appeals for the circuit in which the proceeding is held.

(B) APPEAL BY PETITIONER.—An individual described in paragraph (1) may appeal a final order on a petition for review under paragraph (1) only if a district or circuit judge issues a certificate of appealability. A district judge or circuit judge may issue a certificate of appealability under this subparagraph if the individual has made a substantial showing of actual prejudice to the criminal conviction or sentence of the individual as a result of a violation of Article 36(1) of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, or a comparable provision of a bilateral international agreement addressing consular notification and access.

(b) VIOLATION.—

(1) IN GENERAL.—An individual not covered by subsection (a) who is arrested, detained, or held for trial on a charge that would expose the individual to a capital sentence if convicted may raise a claim of a violation of Article 36(1)(b) or (c) of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, or of a comparable provision of a bilateral international agreement addressing consular notification and access, at a reasonable time after the individual becomes aware of the violation, before the court with jurisdiction over the charge. Upon a finding of such a violation—

(A) the consulate of the foreign state of which the individual is a national shall be notified immediately by the detaining authority, and consular access to the individual shall be afforded in accordance with the provisions of the Vienna Convention on Consular Relations, done at Vienna April 24, 1963, or the comparable provisions of a bilateral international agreement addressing consular notification and access; and

(B) the court—

(i) shall postpone any proceedings to the extent the court determines necessary

to allow for adequate opportunity for consular access and assistance; and

(ii) may enter necessary orders to facilitate consular access and assistance.

(2) EVIDENTIARY HEARINGS.—The court may conduct evidentiary hearings if necessary to resolve factual issues.

(3) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to create any additional remedy.

SEC. 5. DEFINITIONS.

In this Act—

(1) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and

(2) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

June 28, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We thank you for your extraordinary efforts to enact legislation that would facilitate U.S. compliance with its consular notification and access obligations and to express the Administration's strong support for S. 1194, the Consular Notification Compliance Act of 2011 (CNCA).

The millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, are accorded critical protections by international treaties that ensure that detained foreign nationals have access to their country's consulate. Consular assistance is one of the most important services that the United States provides its citizens abroad. Through our consulates, the United States searches for citizens overseas who are missing, visits citizens in detention overseas to ensure they receive fair and humane treatment, works to secure the release of those unjustly detained, and provides countless other consular services. Such assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown. For U.S. citizens arrested abroad, the assistance of their consulate is often essential for them to gain knowledge about the foreign country's legal system and how to access a lawyer, to report concerns about treatment in detention, to send messages to their family, or to obtain needed food or medicine. Prompt access to U.S. consular officers prevents U.S. citizen prisoners from being lost in a foreign legal system.

The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States. By sending a strong message about how seriously the United States takes its own consular notification and access obligations, the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance.

The CNCA will help us ensure that the United States complies fully with our obligations to provide foreign nationals detained in the United States with the opportunity to have their consulate notified and to receive consular assistance. By setting forth the minimal, practical steps that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations (VCCR) and similar bilateral international agreements, the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future

violations and potential claims of prejudice for those who are prosecuted and ultimately convicted. In this regard, the legislation is an invaluable complement to the extensive training efforts each of our Departments conducts in this area.

The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights. By allowing defendants facing capital charges to raise timely claims that authorities have failed to provide consular notification and access, and to ensure that notification and access is afforded at that time, the CNCA further minimizes the risk that a violation could later call into question the conviction or sentence. The CNCA provides a limited post-conviction remedy for defendants who were convicted and sentenced to death before the law becomes effective. To obtain relief, such defendants face a high bar: They must establish not only a violation of their consular notification rights but also that the violation resulted in actual prejudice. Going forward, the CNCA permits defendants who claim a violation of their VCCR rights an opportunity for meaningful access to their consulate but does not otherwise create any judicially enforceable rights.

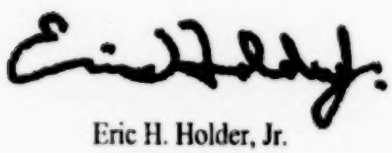
After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31). As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the *Avena* judgment and to comply with the U.S. Supreme Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008). The CNCA will remove a long-standing obstacle in our relationship with Mexico and other important allies, and send a strong message to the international community about the U.S. commitment to honoring our international legal obligations.

The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely—including Mexico, the United Kingdom, the European Union, Brazil and numerous other Latin American countries, and the Council of Europe, among others—have repeatedly and forcefully called upon the United States to fulfill obligations arising from *Avena* and prior ICJ cases finding notification and access violations. We understand that the Governments of Mexico and the United Kingdom have already written to Congress to express their strong support for this legislation.

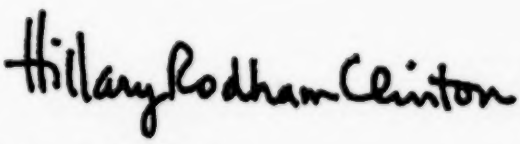
This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with *Avena* has become a significant irritant that jeopardizes other bilateral initiatives. Mexico considers the resolution of the *Avena* problem a priority for our bilateral agenda. The CNCA will help ensure that the excellent U.S.-Mexico cooperation in extradition and other judicial proceedings, the fight against drug trafficking and organized crime, and in a host of other areas continues apace.

In sum, the CNCA is a carefully crafted, measured, and essential legislative solution to these critical concerns. We thank you again for your work towards finding an appropriate legislative solution to this matter of fundamental importance to our ability to protect Americans overseas and preserve some of our most vital international relationships.

Sincerely,



Eric H. Holder, Jr.
Attorney General



Hillary Rodham Clinton
Secretary of State

EMBAJADA DE MÉXICO

Washington, DC
June 14, 2011

The Honorable Hillary Clinton
U.S. Secretary of State
2201 C Street NW
Washington, DC 20520

Dear Secretary Clinton,

On behalf of the Government of Mexico I am writing to express our deepest concern regarding the imminent execution of Humberto Leal García, one of the 51 Mexican nationals whose cases were the subject of proceedings before the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*. Texas intends to execute Mr. Leal on July 7, even though he has not yet received the review and reconsideration mandated by the ICJ's judgment.

The Government of Mexico has never called into question the heinous nature of the crimes attributed to Mr. Leal, and in no way condones violent crime. Nor are we challenging the death penalty *per se*. However, the United States made a commitment to Mexico and to its other treaty partners to abide by the rules of the ICJ. Mexico's goal since it resorted to the ICJ has been solely to ensure due process and due compliance with consular notification rights afforded by the Vienna Convention on Consular Relations to all individuals travelling or residing abroad, including U.S. citizens.

The Government of Mexico is encouraged by the introduction today in the U.S. Senate of legislation that would implement the *Avena* judgment. We recognize this is an important step in the right direction. However, it seems clear that there is not enough time for Congress to pass the legislation before Mr. Leal's execution date. Therefore, it is of paramount importance that the U.S. Administration intervenes in order to prevent the execution from taking place, before Congress has had an opportunity to finally legislate regarding the manner in which the US should comply with its international obligations.

The continued non-compliance with the ICJ's decision has already placed great strain on our bilateral relationship. The execution of Jose Ernesto Medellin in August 2008, which took place in violation of the ICJ's order of provisional measures, was in

direct breach of the United States' international legal obligation to comply with the *Avena* judgment. In January 2009, the ICJ reiterated that the United States' commitments under *Avena* "must be met within a reasonable period of time," and emphasized that "the obligation upon the United States not to execute . . . Humberto Leal García . . . pending review and reconsideration being afforded to [him] is fully intact." Nonetheless, the state of Texas apparently intends to ignore the ICJ by carrying out his execution without providing the requisite review and reconsideration.

While our bilateral agenda is moving forward as a result of a joint commitment to deepen and widen cooperation and dialogue, as I wrote in a letter to your Legal Adviser dated July 7, 2010, a second execution in violation of the ICJ's judgment would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures, including extraditions, mutual judicial assistance, and our efforts to strengthen our common border.

Furthermore, another execution of a Mexican national in direct violation of international law will undoubtedly affect public opinion in Mexico. Under these circumstances, in addition to the likely impact on dialogue and cooperation, my government would face significant pressure from Mexico's Congress to revise our cooperation and to re-examine our commitment to other bilateral programs. It serves neither the United States nor the Mexico-US relationship if the U.S. cannot live up to its treaty obligations.

In light of the potential damage to our bilateral relationship, I respectfully request your full-fledged support to obtain a stay of execution for Mr. Leal. In particular, I ask that the U.S. Government support Mr. Leal's request for a stay of execution in the U.S. Supreme Court, particularly in light of the legislation that was introduced today by Senator Patrick Leahy. Without the intervention of the U.S. Government in support of Mr. Leal, his execution will be practically a foregone conclusion.

I would like to take this opportunity to reiterate to you the assurances of my high esteem and consideration.

Sincerely,

Arturo Sarukhan
Ambassador of Mexico

cc: The Honorable Eric Holder
U. S. Attorney General,
Department of Justice

United States of America

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PROCEEDINGS AND DEBATES OF THE 112th CONGRESS, FIRST SESSION

Vol. 157 WASHINGTON, WEDNESDAY, JUNE 29, 2011 No. 95

House of Representatives

The House was not in session today. Its next meeting will be held on Friday, July 1, 2011, at 10 a.m.

Senate

WEDNESDAY, JUNE 29, 2011

The Senate met at 9:30 a.m. and was called to order by the Honorable KIRSTEN GILLIBRAND, a Senator from the State of New York.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Lord of wonders beyond all majesty, You are holy. We lift our hearts to You today in gratitude for Your goodness and mercy that continue to follow us. Today, guide our lawmakers by Your grace. Lord, show them Your ways; teach them Your path. May the law of love direct their labors, opening the door of new opportunities for service. Empower them to turn from the thoughts, words, and deeds that violate righteousness.

We pray in Your holy Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable KIRSTEN GILLIBRAND led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. INOUYE).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, June 29, 2011.

To the Senate.

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable KIRSTEN GILLIBRAND, a Senator from the State of New York, to perform the duties of the Chair.

DANIEL K. INOUYE,
President pro tempore.

Mrs. GILLIBRAND thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. REID. Madam President, after leader remarks, the Senate will be in morning business for 1 hour. The Republicans will control the first half and the majority the final half.

Following morning business, the Senate will resume consideration of S. Res. 679, the Presidential Appointment Efficiency and Streamlining Act. At 11 a.m. there will be up to five rollcall votes on several amendments and passage of S. 679. We are hopeful some of the amendments will be disposed of by voice vote. Following disposition of the Presidential appointment bill, the Senate will begin consideration of S. Res. 116 which comes out of the Rules Committee. Additional rollcall votes on amendments to the resolution are expected today.

MEDICARE

Mr. REID. Madam President, often very good ideas, no matter how important, take time to ripen. Even when they are ripe they need dedicated advocates to make them a reality. Let me give one example.

President Harry Truman once said:

Millions of our citizens do not now have a full measure of opportunity to achieve and enjoy good health. Millions do not now have protection or security against the economic effects of sickness. And the time has now arrived for action to help them attain that opportunity and help them get that protection.

But in 1945 when he spoke those words to Congress, the time had not yet truly arrived. In fact, it would be another 20 years before Truman's good idea was realized. It would be 20 years before Truman became the first of 19 million Americans to receive a Medicare card.

President Lyndon Johnson signed Medicare and Medicaid into law in the Truman Presidential Library in Independence, MO. The law took effect almost a year later, 45 years ago this week, on July 1, 1966.

At the time Medicare took effect, only half of Americans 65 and older had access to health care coverage. A third of American seniors lived in poverty. "Poverty was so common that we did not know it had a name," President Johnson said, describing a time before Medicare.

Today, virtually every American over 65 has access to health care and the number of seniors who live below the poverty line has dropped by 75 percent. That is no accident. Medicare provides 47 million Americans with the

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

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complete its work and have the FBI Director in place at the end of the summer. That agreement would take the form of a unanimous consent agreement in the Senate, entered into by all Senators, and locked in on the RECORD so that it could not be changed without unanimous consent. That has not occurred. That is the only way to ensure Senate action on a nomination before August 3. The House would also have to agree to such an approach.

Senator COBURN has been unable to convince his leadership and the Republican caucus to agree. It may be because some do not want to agree. It may be because some do not want to give up the "leverage" such a nomination might provide to them on other matters. Maybe they just do not want to make anything too "easy" on this President. Whatever the reasons, no such agreement has been forthcoming in the weeks it has been under consideration.

In fact, at the Judiciary Committee business meeting on the bill, when Senator COBURN could not offer the assurances required to lock in prompt and timely consideration of a subsequent nomination of the FBI Director after enactment of legislation and before August 3, he did suggest that his side of the aisle would forego several steps of the standard process for considering nominees. He offered to waive the questionnaire, the background check, and the confirmation hearing on Director Mueller. But this commitment was illusory, because not even all of the Republican members of the Judiciary Committee agreed. Senator CORNYN, having questioned Director Mueller's "management capacity," indicated that he wanted confirmation hearings and the opportunity to ask questions. Of course, the Senator from Texas was within his rights to say so. But that shows the practical difficulties of following Senator COBURN's complicated, two-part scenario with no guarantee of it being completed by August 3.

Republican Senators lectured us on the case with which the majority leader should be able to obtain cloture on a new nomination of Director Mueller. That again makes my point. Without a binding agreement, it could take days to consider the nomination, perhaps a full week.

We have just witnessed Senate Republicans filibustering for the first time in American history the nomination of the Deputy Attorney General of the United States. They did that just last month. While Senator CORNYN opined that the renomination of Director Mueller should be able to get 60 votes for cloture, and we should be able to end a filibuster of the nomination on the Senate floor, he also said that he could not control other Republican Senators.

To complete action in accordance with Senator COBURN's alternative plan would mean not only passing legislation but the Senate receiving, considering and confirming the renomination of Director Mueller. I was chairman of the Judiciary Committee back in 2001 when the Senate considered and confirmed Director Mueller's initial nomination within two weeks. I worked hard to make that happen. Regrettably, given the current practices of Senate Republicans, and their unwillingness to agree on expedited treatment for President Obama's nominations, it is foolhardy in my judgment to think that all Senate Republicans will cooperate without the binding force of a unanimous consent entered in the RECORD.

Let me mention just one more recent example. Consider the time line of the nomination of the Assistant Attorney General for the National Security Division at the Department of Justice. The nominee was approved unanimously by the Senate Judiciary Committee and unanimously by the Senate Select Committee on Intelligence, and approved unanimously by the Senate just yesterday. That nomination took 15 weeks for the Senate to consider—and she was approved unanimously. It took more than a month just to schedule the Senate vote after the nomination was reported unanimously by the Senate Select Committee on Intelligence, and that was 2½ weeks after it was unanimously reported by the Senate Judiciary Committee. This was a nominee with whom many of us were familiar and who faced no opposition.

Of course, in the case of the FBI Director, there is no necessity to require a new nomination. The simple one-time extension contained in S. 1103 does the job. It provides all the authority needed for the President to ask Director Mueller to stay on and for him to do so without additional action by the Senate. The separate renomination of Director Mueller is not required.

As I have said, all Senate Democrats are prepared to take up and pass S. 1103, and send it to the House of Representatives for it to take final action before August 3. That is what we should be doing. We should do that now, before the Fourth of July recess. There is no good reason for delay. All that is lacking is Senate Republicans' consent.

So, as they stall in moving legislation to respond to President Obama's request to extend Director Mueller's term, Senate Republicans will not commit to the unanimous consent request necessary to allow Senator COBURN's alternative to become a possibility. Seven of the eight Republican members of the Senate Judiciary Committee voted against the bill to extend Director Mueller's term. Senator COBURN had said that if his alternative was not adopted by the committee, he would vote for the bill, but then he changed his mind and voted against. He then said that he will vote for the bill, S. 1103, when it is considered by the Senate, but Senate Republicans—perhaps including Senator COBURN himself—are now objecting to considering it. We have lost another two weeks since the bill was reported by the Judiciary Committee.

Finally, I observe that this is not the only matter the Senate needs to consider before August 3. There is the matter of the United States' default unless the debt ceiling is raised by that time. There is the need to pass the America Invents Act, as passed by the House, to spur innovation and jobs. There are currently 10 executive nominations ready for Senate action reported by the Judiciary Committee and 18 judicial nominations ready for final consideration to address the judicial vacancies crisis. There is much to do, little time, and even less cooperation.

This important legislation, S. 1103, would fulfill the President's request that Congress create a one-time exception to the statutory 10-year term of the FBI Director in order to extend the term of the incumbent FBI Director for 2 additional years. Given the continuing threat to our Nation, especially with the tenth anniversary of the September 11, 2001, attacks approaching, and the need to provide continuity and stability on the President's national security team, it is important that we respond to the President's request and enact this necessary legislation swiftly. The incumbent FBI Director's term otherwise expires on August 3, 2011. I urge the Senate to take up this critical legislation and pass it without further delay.

CONSULAR NOTIFICATION COMPLIANCE ACT

Mr. LEAHY. Mr. President, on June 14, 2011, I introduced the Consular Notification Compliance Act. This legislation will help bring the United States into compliance with its obligations under the Vienna Convention on Consular Relations, VCCR, and is critical to ensuring the protection of Americans traveling overseas.

Each year, thousands of Americans are arrested and imprisoned when they are in foreign countries studying, working, serving in the military, or traveling. From the moment they are detained, their safety and well-being depends, often entirely, on the ability of U.S. consular officials to meet with them, monitor their treatment, help them obtain legal assistance, and connect them to family back home. That access is protected by the consular notification provisions of the VCCR, but it only functions effectively if every country meets its obligations under the treaty—including the United States.

As we now know, in some instances, the United States has not been meeting those obligations. There are currently more than 100 foreign nationals on death row in the United States, most of whom were never told of their right to contact their consulate, and their consulate was never notified of their arrest, trial, conviction, or sentence. This failure to comply with our treaty obligations undercuts our ability to

protect Americans abroad and deeply damages our image as a country that abides by its promises and the rule of law. It would also be completely unacceptable to us if our citizens were treated in this manner.

The Consular Notification Compliance Act seeks to bring the United States one step closer to compliance with the convention. It is a narrowly crafted solution. It focuses only on the most serious cases—those involving the death penalty—but it is a significant step in the right direction and we need to work together to pass it quickly. Texas is poised to execute the next foreign national affected by this failure to comply with the treaty on July 7, 2011. He was not notified of his right to consular assistance, and the Government of Mexico has expressed grave concerns about the case. We do not want this execution to be interpreted as a sign that the United States does not take its treaty obligations seriously, or to further damage relations with an important ally with which we share a border. That message puts American lives at risk.

Since introduction of the Consular Notification and Compliance Act, the Department of Justice and the Department of State have worked with me to explain the importance of the bill, its limited nature, and the urgent need to see it passed. On June 28, Attorney General Holder and Secretary Clinton wrote to me in support of the "carefully crafted, measured, and essential legislative solution" included in the Consular Notification and Compliance Act. I will ask consent to have a copy of the letter printed in the RECORD at the conclusion of my remarks. We have already had productive discussions with Republicans and Democrats from both the House and Senate. I appreciate that others are willing to work together to address this critical issue.

I also want to note all of the favorable commentary the bill has generated, including multiple editorials in major newspapers and numerous letters of support from across the political spectrum. I also will ask that a selection of those be printed in the RECORD following my remarks.

Everyone agrees that this legislation is not about giving breaks to criminals. It is not about expanding habeas corpus relief. It is not about weakening the death penalty. This bill is about three things only. It is about protecting Americans when they work, travel, and serve in the military in foreign countries. It is about fulfilling our obligations and upholding the rule of law. And it is about removing a significant impediment to full and complete cooperation with our international allies on national security and law enforcement efforts that keep Americans safe.

The bottom line is this—our failure to comply with our legal obligations places Americans at risk. As chairman of the Senate Judiciary Committee, I am announcing that I intend to hold a hearing on this critical issue in July. We must work together, and we must act now.

Mr. President, I ask unanimous consent to have printed in the RECORD the letters and editorials to which I referred.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

JUNE 28, 2011.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: We thank you for your extraordinary efforts to enact legislation that would facilitate U.S. compliance with its consular notification and access obligations and to express the Administration's strong support for S. 1194, the Consular Notification Compliance Act of 2011 (CNCA).

The millions of U.S. citizens who live and travel overseas, including many of the men and women of our Armed Forces, are accorded critical protections by international treaties that ensure that detained foreign nationals have access to their country's consulate. Consular assistance is one of the most important services that the United States provides its citizens abroad. Through our consulates, the United States searches for citizens overseas who are missing, visits citizens in detention overseas to ensure they receive fair and humane treatment, works to secure the release of those unjustly detained, and provides countless other consular services. Such assistance has proven vital time and again, as recent experiences in Egypt, Libya, Syria and elsewhere have shown. For U.S. citizens arrested abroad, the assistance of their consulate is often essential for them to gain knowledge about the foreign country's legal system and how to access a lawyer, to report concerns about treatment in detention, to send messages to their family, or to obtain needed food or medicine. Prompt access to U.S. consular officers prevents U.S. citizen prisoners from being lost in a foreign legal system.

The United States is best positioned to demand that foreign governments respect consular rights with respect to U.S. citizens abroad when we comply with these same obligations for foreign nationals in the United States. By sending a strong message about how seriously the United States takes its own consular notification and access obligations, the CNCA will prove enormously helpful to the U.S. Government in ensuring that U.S. citizens detained overseas can receive critical consular assistance.

The CNCA will help us ensure that the United States complies fully with our obligations to provide foreign nationals detained in the United States with the opportunity to have their consulate notified and to receive consular assistance. By setting forth the minimal, practical steps that federal, state, and local authorities must take to comply with the Vienna Convention on Consular Relations (VCCR) and similar bilateral international agreements, the CNCA will ensure early consular notification and access for foreign national defendants, avoiding future violations and potential claims of prejudice for those who are prosecuted and ultimately convicted. In this regard, the legislation is an invaluable complement to the extensive training efforts each of our Departments conducts in this area.

The CNCA appropriately balances the interests in preserving the efficiency of criminal proceedings, protecting the integrity of criminal convictions, and providing remedies for violation of consular notification rights. By allowing defendants facing capital charges to raise timely claims that authorities have failed to provide consular notification and access, and to ensure that notification and access is afforded at that time, the CNCA further minimizes the risk that a violation could later call into question the conviction or sentence. The CNCA provides a limited post-conviction remedy for defendants who were convicted and sentenced to death before the law becomes effective. To obtain relief, such defendants face a high bar: They must establish not only a violation of their consular notification rights but also that the violation resulted in actual prejudice. Going forward, the CNCA permits defendants who claim a violation of their VCCR rights an opportunity for meaningful access to their consulate but does not otherwise create any judicially enforceable rights.

After more than seven years and the efforts of two administrations, the CNCA will also finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals (Mex. v. US)*, 2004 I.C.J. 12 (Mar. 31). As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the Avena judgment and to comply with the U.S. Supreme Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). The CNCA will remove a long-standing obstacle in our relationship with Mexico and other important allies, and send a strong message to the international community about the U.S. commitment to honoring our international legal obligations.

The CNCA unmistakably benefits U.S. foreign policy interests. Many of our important allies and regional institutions with which we work closely—including Mexico, the United Kingdom, the European Union, Brazil and numerous other Latin American countries, and the Council of Europe, among others—have repeatedly and forcefully called upon the United States to fulfill obligations arising from Avena and prior ICJ cases finding notification and access violations. We understand that the Governments of Mexico and the United Kingdom have already written to Congress to express their strong support for this legislation.

This legislation is particularly important to our bilateral relationship with Mexico. Our law enforcement partnership with Mexico has reached unprecedented levels of cooperation in recent years. Continued noncompliance with Avena has become a significant irritant that jeopardizes other bilateral initiatives. Mexico considers the resolution of the Avena problem a priority for our bilateral agenda. The CNCA will help ensure that the excellent U.S.-Mexico cooperation in extradition and other judicial proceedings, the fight against drug trafficking and organized crime, and in a host of other areas continues apace.

In sum, the CNCA is a carefully crafted, measured, and essential legislative solution to these critical concerns. We thank you again for your work towards finding an appropriate legislative solution to this matter of fundamental importance to our ability to protect Americans overseas and preserve some of our most vital international relationships.

Sincerely,

ERIC H. HOLDER, JR.,
Attorney General.
HILLARY RODHAM CLINTON,
Secretary of State.

[From the Washington Post, June 13, 2011]

WHY THE U.S. SHOULD ALLOW ARRESTED FOREIGNERS TO CONTACT THEIR CONSULATES

Humberto Leal Jr. is scheduled to be put to death by the state of Texas next month

for the 1994 murder of a 16-year-old girl. Like so many cases involving capital punishment, Mr. Leal's has generated controversy, but not for the typical reasons.

Mr. Leal is a Mexican national. When he was arrested, Texas officials failed to advise him of his right to communicate with his country's embassy as required by the Vienna Convention on Consular Relations. The United States, Mexico and some 160 other countries are signatories to the convention. Mr. Leal is one of roughly 40 Mexican nationals who were not advised about consular access and who sit on death row in this country.

Mexico filed a grievance on behalf of its nationals and prevailed in 2004 before the International Court of Justice (ICJ), the judicial arm of the United Nations. The ICJ concluded that the United States was obligated to comply with the treaty and that it should review these cases to determine whether the defendants had been harmed by the lack of notification.

Texas, where the majority of these inmates are held, balked. Three years ago, the state executed Jose Ernesto Medellin, another Mexican national who was not informed of his right to consular access and who was denied additional review. The state is likely to take the same approach in the Leal case. "Here, in Texas, if you commit terrible and heinous crimes you're going to pay the ultimate price," says Katherine Cesinger, press secretary to Gov. Rick Perry.

This misses the point entirely. This is not about coddling criminals nor is it a referendum on the death penalty. It is about a country's obligation to honor its treaty commitments. The United States must comply with the Vienna Convention—and demonstrate good faith in addressing past mistakes—if U.S. citizens abroad are to be afforded the same rights and protections.

Sen. Patrick J. Leahy (D-Vt.) is expected to introduce legislation as soon as this week to provide meaningful review in federal court for those denied consular access. The legislation should be narrowly tailored and mandate that the legal proceedings focus solely on whether denial of access seriously prejudiced an inmate's ability to defend against charges. The bar for success should be high, and only those who can provide compelling evidence of such harm should be allowed a new trial or benefit from a reduced sentence.

To avoid this problem in the future, federal and state governments should be diligent about abiding by the treaty's mandates. The State Department should continue its outreach to state and local governments to impress upon law enforcement officials the importance of the consular notification. Complying with the treaty is not only the right thing to do; it is the smart and self-interested thing to do.

[From the New York Times, June 17, 2011]

THE TREATY AND THE LAW

Humberto Leal Garcia Jr., a Mexican citizen who faces execution in Texas next month, has petitioned Gov. Rick Perry for a six-month reprieve. He is asking for a stay under a vital international law, the Vienna Convention on Consular Relations, which requires that foreign nationals who are arrested be told of their right to have their embassy notified of that arrest and to ask for help.

In recent years, the treaty has provided important protection for Americans who have been detained in Iran, North Korea and elsewhere. Mr. Leal was not notified after his arrest of his right to contact his embassy. But the Supreme Court ruled in 2008 that Texas did not need to comply with the treaty because there is no federal law requiring that states do so.

Senator Patrick Leahy of Vermont on Tuesday introduced a bill that makes clear that federal law requires that states tell foreign nationals who have been arrested that they can contact their consulates for help.

For those who were convicted and sentenced without being told, the bill would let them ask a federal court to review their case and decide whether the outcome would have been different if they had had diplomatic help. After the bill was introduced, Mr. Leal petitioned Federal District Court for a stay to keep Texas from "rushing to execute" him before Congress has time to act.

Mr. Leal, convicted of murder during a sexual assault, had grossly incompetent legal representation. If he had been given access to a Mexican diplomat, he would have had a chance at better counsel and likely the opportunity to strike a plea deal, avoiding the death penalty.

For the sake of justice, the governor and court should grant the stays. For the protection of foreigners arrested here, and American citizens arrested abroad, Congress should pass Senator Leahy's bill.

[From the Austin American-Statesman, June 10, 2011]

EXECUTION CASE IMPORTANT TO INTERNATIONAL RELATIONS

The Golden Rule of life also applies to the tricky business of international relations. What we do to non-Americans in our country we can reasonably expect to be done unto Americans in other countries.

It is for that reason that Gov. Rick Perry and the Texas Board of Pardons and Paroles—both in the uncommon position of making a decision with international impact—should commute or postpone the death sentence of Humberto Leal, a Mexican raised in Texas, scheduled to die July 7 for the 1994 murder of Adria Sauceda, 16, in Bexar County.

The key issue in this case at this point is not whether Leal committed the crime. Also not central now are the circumstances involving Leal, including sexual abuse by a priest, a challenging family history and other factors that, though significant, fail to add up to justification for murder. They could, however, count as mitigating factors that argue for a life sentence.

It's what happened after Sauceda was killed that is at issue. More specifically, it's what didn't happen. Despite the Vienna Convention on Consular Relations requirements, Leal was not informed of his right to contact Mexican officials to seek legal assistance. Records indicate that he was not aware of that right until told about it by a fellow death row inmate.

Instead of getting legal help from Mexican consular officials, who have a track record of providing quality legal representation for Mexicans facing the death penalty in the U.S., Leal was represented by a court-appointed team that included a lawyer who twice had his license suspended.

Back in 2004, the International Court of Justice said Leal was entitled to a hearing to determine the extent of harm he suffered as a result of the lack of consular access. A U.S. Supreme Court ruling has said the U.S. must comply with the decision by the international court. Texas, citing state law, said no such hearing could take place. Congress now is poised to consider legislation, to be filed in coming weeks, that would establish a procedure for a federal court hearing on the extent of harm caused to Leal because he was not advised of his right to contact Mexican officials.

In a clemency petition filed this week, an impressive list of former U.S. diplomats, retired military leaders and others concerned about international matters urged a stay of execution to grant Congress time to deal with this case.

At stake, they said, are the consular rights of Americans who become entangled in legal problems while out of the country.

"For Texas to proceed with (Leal's) execution prior to full compliance with these treaty obligations would endanger the interests of American citizens and the United States around the world," John B. Bellinger III, a State Department legal adviser in the George W. Bush administration, said in a letter signed by others and delivered to Perry.

The former military leaders told Perry that "improving U.S. enforcement of its consular notification and legal access obligations will help protect American citizens detained abroad, including U.S. military personnel and the families stationed overseas."

Sandra L. Babcock, a Northwestern University law professor representing Leal, said he would not have been convicted if he had received proper consular assistance. We have no way of knowing that. But there is no arguing with Babcock's contention that "with consular access, Mr. Leal would have had competent lawyers and expert assistance that would have transformed the quality of his defense."

And, as she noted, Mexican officials have developed expertise in helping Mexicans facing the death penalty in the U.S.

"It really is a very modest remedy we are talking about," Babcock said.

Modest, indeed, but with important international ramifications.

[From the Houston Chronicle, June 22, 2011]

KEEPING OUR WORD: SCHEDULED TEXAS EXECUTION VIOLATES TREATY AND ENDANGERS AMERICANS ABROAD

Americans traveling abroad are protected, whether they are aware of it or not, by a treaty called the Vienna Convention on Consular Relations, ratified by about 170 countries, which guarantees them access to U.S. consular assistance if they are detained or arrested in a foreign country. In 2010, more than 6,600 Americans were arrested abroad, and more than 3,000 were incarcerated. Many of them benefited from the protections of this treaty.

But unfortunately, the U.S. has repeatedly failed to offer those same protections to foreigners on U.S. soil. The most egregious of these violations is the denial of consular assistance to foreign nationals convicted and sentenced to death. (Currently, about 100 foreign nationals are on U.S. death rows.) And in a particularly urgent case, one of those individuals whose rights were violated, a Mexican national named Humberto Leal Garcia, is scheduled to be executed on July 7 in Huntsville.

Because a bill has been introduced to bring the U.S. into compliance with the treaty, Leal's attorneys have filed a federal petition and a motion for a stay of execution so that Leal will be alive and eligible for the remedies of this legislation when it becomes law.

There are compelling reasons why these petitions should be granted. Chief among them is the fact that this pending legislation will allow for review of cases like Leal's, said his attorney Sandra Babcock, "where lack of consular assistance may well have made the difference between life and death. That's why the consular access really matters." Mexico provides top-flight legal assistance to its nationals under such circumstances.

Leal's court-appointed attorneys were ineffective and inexperienced, Babcock told the Chronicle, resulting in harm to Leal in both the guilt-or-innocence and the penalty phases of his trial. According to Babcock,

they failed to challenge the prosecution's "junk science" and flawed DNA evidence or to present expert testimony on Leal's learning disabilities and brain damage. Leal, sentenced to death for the 1994 rape and murder of a 16-year-old girl, was then 21 and had no criminal record.

Also, there is no dispute that this treaty is the law. In 2003, Mexico filed suit against the U.S., claiming that 51 Mexican nationals sentenced to death in U.S. courts had been denied consular access. (Leal was one of them.) In 2004, the International Court of Justice ruled that the U.S. must review those individuals' cases. The issue was finally resolved, in 2008, by the U.S. Supreme Court, which unanimously supported the ICJ decision but ruled that it was up to Congress to implement it.

That is what Senate Judiciary Committee Chairman Patrick Leahy addressed last week, when he introduced legislation to allow federal courts to review such cases, and to increase compliance and provide remedies.

And finally, as Leahy eloquently stated, the U.S. failure to honor its treaty obligations "undercuts our ability to protect Americans abroad and deeply damages our image as a country that abides by its promises and the rule of law. It would also be completely unacceptable to us if our citizens were treated in this manner."

For all of these reasons, we urge Congress to act swiftly to pass this legislation, and we urge Gov. Perry to give Leal, and others in his situation, the time to benefit from its remedies if they are shown to have been harmed.

PERRY, UTAH

Mr. HATCH. Mr. President, I rise today to pay tribute to the great city of Perry, UT, on the 100th anniversary of its incorporation.

Today, Perry is a beautiful city of nearly 4,000 residents nestled at the foot of northern Utah's majestic Wasatch Mountains. Its fame and acclaim are extensive for a variety of reasons.

First, it is the apple of many a person's eye because of its location on Utah's famed Fruit Way. Its fruit stands along highway 89 are laden with apples, cherries, apricots, peaches, pears and other produce. I have never found any fruit nearly so sweet in all my travels.

Perry is also home to the legendary Maddox Ranch House, where succulent steaks, fried chicken, homemade rolls and other fare have been food for thought and the palate for locals and many a weary traveler—this Senator, included—for more than six decades.

Best of all, though, are the wonderful residents of Perry. I have always been unfailingly impressed with their work ethic and civic-mindedness their eagerness and willingness to pitch in and build a better future and community for their children and grandchildren.

They also are warm and welcoming. Whenever people pop in, they never seem to be put out. It has been my experience that they are always eager to lend a hand or extend the hand of friendship. I always feel better for being there. It doesn't hurt that my wife Elaine hails from nearby Newton. Little wonder that every time I am in Perry I feel right at home.

Great places like Perry don't just happen. It takes vision and hard work—a trait Orrin Porter Rockwell and his brother Merritt undoubtedly had in abundance when they laid claim to a piece of land in the area adjacent Porter Spring. They were followed in 1851 by the Mormon pioneers, settlers of faith and fortitude who befriended the Native Americans there and founded what became known as Three Mile Creek.

Many milestones have come and gone since then. In 1861 the first school was built, followed by the groundbreaking for the Northern Utah Railroad 10 years later. And the settlers also weathered some adversity, including harsh winters and the Great Flood of 1896. Two years later, Three Mile Creek was renamed Perry in honor of Orrin Alonzo Perry, who served as an LDS bishop there for more than two decades.

June 19, 1911, the date of Perry's incorporation, was another major event and marked a new beginning. Over the ensuing years, the people of Perry, under the guidance of some remarkable and visionary leaders, kept right on building, bringing electricity, drinking water, a town hall and more schools to the city. Just this year, Perry added a wastewater treatment plant and a soccer park to the mix. And I trust many more chapters remain to be written in Perry's illustrious history.

As Perry celebrates its centennial over the Fourth of July weekend, I salute its visionary and hardworking citizens, both past and present, who have made the city what it is today. I am sure Orrin Porter Rockwell and Orrin Alonzo Perry would be proud. You can be certain that this Orrin is.

EXPLOITING GAPS IN U.S. GUN LAWS

Mr. LEVIN. Mr. President, I have long sought to bring attention to the dangerous gaps in U.S. gun laws, hoping the exposure would lead to the passage of commonsense firearm legislation. To those of us who feel that Congress can and should play a role in protecting American neighborhoods from the scourge of gun violence, enacting laws to ensure firearms stay out of the hands of dangerous people seems like a no-brainer. Unfortunately, the National Rifle Association, despite broad support for sensible gun safety laws among Americans across the political spectrum, has successfully blocked much-needed legislative changes.

Recently a startling new voice joined the discussion highlighting the weaknesses in our gun laws, most notably how we administer firearm background checks. Consider the following quote describing the so-called gun show loophole:

> America is absolutely awash with easily obtainable firearms. You can go down to a gun show at the local convention center and come away with a fully automatic assault rifle without a background check and, most likely, without having to show an identification card.

While this quote does not break any new ground regarding the dangers of the gun show loophole, it is noteworthy because of the person who said it. These were not the words of a Member of Congress, advocating for legislation, nor were they the words of a spokesperson of groups like Mayors Against Illegal Guns or the Brady Campaign. This quote is taken from an Internet video message recorded by Adam Gadahn, an American-born, confirmed al-Qaida operative.

In the video, Gadahn speaks to al-Qaida followers and sympathizers, describing the ease with which a person can purchase a firearm from a private seller without a background check, often with no questions asked. In fact, this video is not merely a description of the loopholes in U.S. gun laws, it is an exhortation to would-be terrorists to exploit these loopholes and kill innocent Americans. To wit, the video ends with Gadahn asking his viewers, "What are you waiting for?"

This video is a chilling reminder that dangerous loopholes exist in U.S. gun laws, weaknesses that terrorists are actively trying to exploit. While Gadahn is not entirely accurate—a person cannot purchase a "fully automatic assault" rifle at a gun show without government knowledge—he correctly describes just how simple it is for dangerous individuals to acquire deadly weapons in the United States, including semi-automatic assault rifles.

I urge my colleagues to take up and pass two gun safety bills introduced by Senator FRANK LAUTENBERG: the Gun Show Background Check Act, S. 35, which would close the loophole that makes it easy for criminals, terrorists and other prohibited buyers to evade background checks and buy guns from private citizens at gun shows; and the Denying Firearms and Explosives to Dangerous Terrorists Act, S. 34, which would close the loophole in Federal law that hinders the ability of law enforcement to keep firearms out of the hands of terrorists by authorizing the Attorney General to deny the sale of a firearm when a background check reveals that the prospective purchaser is a known or suspected terrorist.

Congressional action should not require such stark evidence that al-Qaida and like-minded criminals are trying to use weak U.S. gun laws to carry out terrorist attacks against Americans. But the evidence—clear, explicit and terrifying—is here nonetheless. The time to act is long overdue.

UTAH SHAKESPEARE FESTIVAL

Mr. HATCH. Mr. President, today I wish to pay tribute to the Utah Shakespeare Festival, the Nation's premier regional theater and one of our State's crown jewels, on the occasion of its 50th anniversary.

EUROPEAN UNION
DELEGATION TO THE UNITED STATES OF AMERICA

The Head of Delegation

Washington, 13 June 2011
PSD/LV/BW/ip D(2011) 1775

The Honorable
Rick Perry
Governor, State of Texas
207 Statehouse
Springfield, Illinois 62706

Fax: 217 524-4049

Dear Governor,

The European Union is writing to make an urgent appeal on behalf of Mr. Humberto Leal, whom we understand has received a date for execution of July 7, 2011.

The European Union recognizes that a terrible crime lies at the heart of this case and extends its sympathy to the family and survivors of the victim.

The European Union urges a reprieve be granted to Mr. Leal pending legislative action to bring the United States into compliance with its treaty obligations.

On March 31, 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Article 36 of the Vienna Convention on Consular Relations and held that Mr. Leal is entitled to review and reconsideration of his sentence to determine whether, and how, he was prejudiced by the violation of his consular rights. The European Union acknowledges that the United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in Medellin v. Texas, the United States Supreme Court held that Congress must pass legislation implementing the Avena judgment before it can be enforced by U.S. courts.

All Member States of the European Union are party to the Vienna Convention on Consular Relations and to the United Nations Charter. The EU considers the respect for reciprocal treaty obligations based rights to be of vital importance to all aspects of the transatlantic relationship. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36.

2175 K Street NW, Washington, DC 20037-1831 Telephone: (202) 862.9500. Telefax: (202) 429.1766.
E-Mail Address: delegation-washington@eeas.europa.eu

European Union Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate a foreign country's legal system in the absence of support from his home nation, even if he is represented by competent legal counsel. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention.

The European Union is concerned that if Mr. Leal is executed before receiving the remedy to which he is entitled under the Avena Judgment, an undisputed international obligation will be breached. Such a breach would undermine the international rule of law and could potentially impede the ability of consular officials around the world to carry out their duties.

Therefore, the European Union respectfully urges you to grant Mr. Leal a reprieve, thus allowing time for Congress or the Texas legislature to pass legislation implementing the ICJ's Avena Judgment.

Sincerely,

João Vale de Almeida
Ambassador

Embassy of Chile

Office of the Ambassador

Washington, DC. June 22, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: Humberto Leal García

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal García, a Mexican national who is facing execution in Texas on July 7, 2011. I urge you to grant Mr. Leal a reprieve based on humanitarian considerations and factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had breached the obligations concerning Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to comply with the *Avena* Judgment.

My Government is concerned that Mr. Leal be executed before receiving the remedy which is entitled under the *Avena* Judgment and the United States is committed to

comply. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,

Arturo Fernandois
Ambassador of Chile

EMBASSY OF EL SALVADOR
1400 16TH ST. N.W., SUITE 100
WASHINGTON, DC 20036

June 20th, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428
By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711
By Fax 512.463.8120

Re: Humberto Leal García

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal García, a Mexican national who is facing execution in Texas on July 7th, 2011. I urge you to grant Mr. Leal a reprieve based on several factors, as outlined below.

On March 31, 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

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My Government is concerned that the United States will breach its undisputed international obligation if Mr. Leal is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,

Francisco Altschul
Ambassador of El Salvador

EMBAJADA DE HONDURAS

WASHINGTON, D.C.

THE AMBASSADOR

June 13, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: Humberto Leal García

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal García, a Mexican national who is facing execution in Texas on July 7, 2011, in order to request you to grant Mr. Leal a reprieve based on several factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment. However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

...2/

My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

The ICJ's sentence must be applied in favor of Mr. Leal and our Government is concerned that the United States will breach its undisputed international obligation if Mr. Leal is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Please accept the assurances of my distinguished consideration.

Sincerely,

Jorge Ramón Hernández-Alcerro

Confédération suisse
Confederazione Svizzera
Confederaziun svizra

America

Fax

Date	07.06.2011
Fax number	(512) 463 18 49
Recipient	The Honorable Rick Perry Governor of Texas Office of the Governor P.O. Box 12428 Austin TX 78711-2428
Number of pages	2

Information
Our reference: 417.02-HVO
Phone: (202) 745 7900
Fax: (202) 387 2564

Re: Execution of Mr. Humberto Leal

Dear Governor Perry

It has been brought to my attention that in the case of Mr. Humberto Leal an execution date has been scheduled for July 7, 2011, in view of which I wish to make an urgent humanitarian appeal on behalf of the Swiss Government.

The Government of Switzerland is opposed to the use of capital punishment under all circumstances and works with the international community towards its universal abolition. We consider the use of this punishment to be cruel and inhuman and emphasize that any judicial error in its application is irreversible. Furthermore, there is no consistent evidence to support that this punishment acts as a deterrent against serious crime any more than life imprisonment.

The Swiss Government notes that, at the time of his arrest and during his trial, Mr. Leal, a Mexican citizen, was denied the right to ask for the assistance of the Mexican Consulate, as provided for in Article 36 of the Vienna Convention on Consular Relations (VCCR). In 2004, the International Court of Justice (ICJ) ruled, in *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, that the United States had violated Article 36 of the VCCR, holding that Mr. Leal is entitled to review and reconsideration of his sentence to determine whether, and how, he was prejudiced by the violation of his consular rights. The US Supreme Court later confirmed, in *Medellín v. Texas*, that the United States had an international legal obligation to comply with the ICJ ruling of the *Avena* case, through a congressional act.

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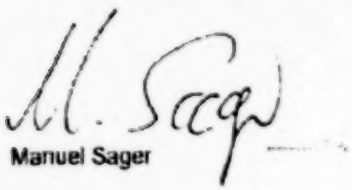
Switzerland considers consular access to be of critical importance and believes that enforcement of treaty obligations depends on reciprocal compliance by all parties to the Convention.

Taking account of this information, Switzerland respectfully urges you to grant Mr. Leal a reprieve to allow time for Congress or the Texas legislature to pass legislation implementing the ICJ's *Avena* Judgment.

Sincerely

The Ambassador of Switzerland



Manuel Sager

Embassy of Uruguay
Washington, D.C

Washington, DC June, 2011

The Honorable Rick Perry
Office of the Governor
State Capitol
P.O. Box 12428
Austin, Texas 78711-2428

By Fax 512.463.1849

Ms. Rissie Owens, Presiding Officer
Texas Board of Pardons and Paroles
Executive Clemency Unit
Capital Section
P.O. Box 13401
Austin, Texas 78711

By Fax 512.463.8120

Re: **Humberto Leal Garcia**

Dear Governor Perry and Presiding Officer Owens:

I am writing you regarding the case of Humberto Leal Garcia, a Mexican national who is facing execution in Texas on July 7, 2011. I urge you to grant Mr. Leal a reprieve based on several factors, as outlined below.

On March 31 2004, the International Court of Justice (ICJ) ruled in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) that the United States had violated Mr. Leal's right to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. The United States has recognized its international legal obligation to implement the remedies mandated by the ICJ in this judgment.

However, in *Medellin v. Texas*, the United States Supreme Court held that Congress must pass legislation implementing the *Avena* judgment before it can be enforced by U.S. courts.

My Government is a party to the Vienna Convention on Consular Relations and the United Nations Charter. The Vienna Convention is crucial for the protection of all nationals who travel abroad. Enforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention. Moreover, all member states to the Charter of the United Nations have agreed to comply with the decisions of the ICJ in any case to which they are a party (Article 94). Therefore, the United States has an international obligation to all member states of the Charter of the United Nations to comply with the *Avena* Judgment.

My Government is concerned that the United States will breach its undisputed international obligation if Mr. Leal is executed before receiving the remedy to which he is entitled under the *Avena* Judgment. Such a breach would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.

For the foregoing reasons, my Government respectfully urges you to grant Mr. Leal a reprieve so that Congress or the Texas legislature may have sufficient time to pass legislation implementing the *Avena* Judgment.

Thank you for your consideration of this extremely serious matter.

Sincerely,

Carlos Gianelli

Carlos Gianelli
Ambassador

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 1, 2011

The Honorable Rick Perry
Governor of Texas
P.O. Box 12428
Austin, Texas 78711-2428

Re: *In re Humberto Leal Garcia*

Dear Governor Perry:

I write you urgently regarding the case of Humberto Leal Garcia, a Mexican national scheduled to be executed in Texas on July 7, 2011. Specifically, I ask for you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal's execution date to afford a reasonable time for Congress to enact pending legislation that would avoid an international law violation in this case.

In *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (*Avena*), the International Court of Justice (ICJ) found that Mr. Leal had been convicted and sentenced to death without being informed that he could seek the assistance of the Mexican consulate, in violation of the United States' obligations under the Vienna Convention on Consular Relations. His execution on July 7 would violate the United States' obligations under the ICJ judgment, which required the United States to provide judicial "review and reconsideration" to determine whether Leal's conviction or sentence was actually prejudiced by the consular violation.

As you know, President Bush sought to secure U.S. compliance with the *Avena* judgment by directing the state courts to provide the requisite review and reconsideration. In *Medellín v. Texas*, 552 U.S. 491 (2008), the U.S. Supreme Court found this effort legally insufficient and recognized *Avena* as imposing a binding international legal obligation, but indicated that Congress could ensure compliance through legislation.

On June 14, 2011, Senator Patrick Leahy introduced S. 1194, the Consular Notification Compliance Act of 2011 (CNCA) (attached), which, if enacted, will bring the United States into compliance with our *Avena* obligations by providing for post-conviction review of Vienna Convention violations for Mr. Leal and other foreign nationals currently on death row. This legislation was developed in close consultation with the Administration, and as the attached letter of June 28 from the Secretary of State and the Attorney General indicates, the Administration strongly supports it. However, enactment of this legislation necessarily will take some time. I therefore respectfully request that you secure a continuance or modification of Leal's execution date at this time to afford a reasonable opportunity for Congress and the President to achieve compliance with the United States' international obligations.

This request is not a comment on either the conviction or sentence in this case, or on whether Mr. Leal or any other individual would be able to demonstrate actual prejudice. Rather it is simply a request that Texas authorities help us take the steps that both the Supreme Court and the Texas Court of Criminal Appeals have recognized are necessary to bring the United States into compliance with outstanding international law obligations. As the Supreme Court in *Medellín* made clear, Texas itself could satisfy the United States' international legal obligations in this matter, by providing Mr. Leal with a hearing that would give appropriate judicial review and reconsideration of his conviction and sentence under circumstances in which the reviewing court had legal authority to award any appropriate relief. Just this week, three judges of the Texas Court of Criminal Appeals recognized the undisputed, binding obligations the *Avena* judgment creates for the United States and the State of Texas, and called for Texas officials to take action to secure Mr. Leal a stay during the pendency of federal legislation.

A temporary delay of Mr. Leal's execution date would not prejudice Texas's important and legitimate law enforcement interests, and it would protect compelling long-term interests of both the United States and the State of Texas. Ensuring compliance with our international consular obligations here at home is essential to ensuring that American citizens from Texas and other states can benefit from U.S. consular assistance if they are detained abroad. Like all Americans, Texans who travel and are detained overseas rely upon precisely the kind of consular notification that was not given here. Mexico has also made clear that Mr. Leal's execution in breach of our international obligations would seriously jeopardize the ability of the Mexican Government to continue cooperating with the United States on cross-border law enforcement and security and other issues of critical importance to the State of Texas. In the one prior case in which Texas

executed a Mexican national subject to the *Avena* judgment – that of Jose Ernesto Medellin in 2008 – Mexico brought a second suit against the United States in the ICJ, which found that the execution constituted another violation. We are concerned that the execution of Mr. Leal, without his receiving the review and reconsideration to which he is entitled under *Avena*, would simply trigger another round of international litigation damaging to our foreign policy interests.

For these reasons, the United States has a compelling interest in ensuring that this case does not result in a breach of U.S. international law obligations. I therefore ask you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal's execution date to afford a reasonable time for Congress to enact pending legislation, so that we can avoid the significant damage to United States interests that would result from an execution in violation of our international obligations. Identical copies of this letter are being sent to the Texas Attorney General, the Texas Board of Pardons and Paroles, and the Bexar County District Attorney.

Please let me know if there is any support that we might give you in securing this outcome. As you can understand, time is of the essence. Given the urgency of the situation, we ask that you take that action at the earliest possible instance. I am happy to speak with you if you have any questions regarding this letter. My cell phone number is (202) 262-8295 and my email is KohHH@state.gov. Please feel free to call or contact me at any time, including over the July 4th holiday weekend if necessary.

Sincerely,

Harold Hongju Koh
Legal Adviser

Attachments as stated

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 1, 2011

The Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711

Re: *In re Humberto Leal Garcia*

Dear Attorney General Abbott:

I write you urgently regarding the case of Humberto Leal Garcia, a Mexican national scheduled to be executed in Texas on July 7, 2011. Specifically, I ask for you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal's execution date to afford a reasonable time for Congress to enact pending legislation that would avoid an international law violation in this case.

In *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (*Avena*), the International Court of Justice (ICJ) found that Mr. Leal had been convicted and sentenced to death without being informed that he could seek the assistance of the Mexican consulate, in violation of the United States' obligations under the Vienna Convention on Consular Relations. His execution on July 7 would violate the United States' obligations under the ICJ judgment, which required the United States to provide judicial "review and reconsideration" to determine whether Leal's conviction or sentence was actually prejudiced by the consular violation.

As you know, President Bush sought to secure U.S. compliance with the *Avena* judgment by directing the state courts to provide the requisite review and reconsideration. In *Medellín v. Texas*, 552 U.S. 491 (2008), the U.S. Supreme Court found this effort legally insufficient and recognized *Avena* as imposing a binding international legal obligation, but indicated that Congress could ensure compliance through legislation.

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for post-conviction review of Vienna Convention violations for Mr. Leal and other foreign nationals currently on death row. This legislation was developed in close consultation with the Administration, and as the attached letter of June 28 from the Secretary of State and the Attorney General indicates, the Administration strongly supports it. However, enactment of this legislation necessarily will take some time. I therefore respectfully request that you secure a continuance or modification of Leal's execution date at this time to afford a reasonable opportunity for Congress and the President to achieve compliance with the United States' international obligations.

This request is not a comment on either the conviction or sentence in this case, or on whether Mr. Leal or any other individual would be able to demonstrate actual prejudice. Rather it is simply a request that Texas authorities help us take the steps that both the Supreme Court and the Texas Court of Criminal Appeals have recognized are necessary to bring the United States into compliance with outstanding international law obligations. As the Supreme Court in *Medellin* made clear, Texas itself could satisfy the United States' international legal obligations in this matter, by providing Mr. Leal with a hearing that would give appropriate judicial review and reconsideration of his conviction and sentence under circumstances in which the reviewing court had legal authority to award any appropriate relief. Just this week, three judges of the Texas Court of Criminal Appeals recognized the undisputed, binding obligations the *Avena* judgment creates for the United States and the State of Texas, and called for Texas officials to take action to secure Mr. Leal a stay during the pendency of federal legislation.

A temporary delay of Mr. Leal's execution date would not prejudice Texas's important and legitimate law enforcement interests, and it would protect compelling long-term interests of both the United States and the State of Texas. Ensuring compliance with our international consular obligations here at home is essential to ensuring that American citizens from Texas and other states can benefit from U.S. consular assistance if they are detained abroad. Like all Americans, Texans who travel and are detained overseas rely upon precisely the kind of consular notification that was not given here. Mexico has also made clear that Mr. Leal's execution in breach of our international obligations would seriously jeopardize the ability of the Mexican Government to continue cooperating with the United States on cross-border law enforcement and security and other issues of critical importance to the State of Texas. In the one prior case in which Texas executed a Mexican national subject to the *Avena* judgment – that of Jose Ernesto Medellin in 2008 – Mexico brought a second suit against the United States in the ICJ, which found that the execution constituted another violation. We are

concerned that the execution of Mr. Leal, without his receiving the review and reconsideration to which he is entitled under *Avena*, would simply trigger another round of international litigation damaging to our foreign policy interests.

For these reasons, the United States has a compelling interest in ensuring that this case does not result in a breach of U.S. international law obligations. I therefore ask you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal's execution date to afford a reasonable time for Congress to enact pending legislation, so that we can avoid the significant damage to United States interests that would result from an execution in violation of our international obligations. Identical copies of this letter are being sent to the Texas Governor, the Texas Board of Pardons and Paroles, and the Bexar County District Attorney.

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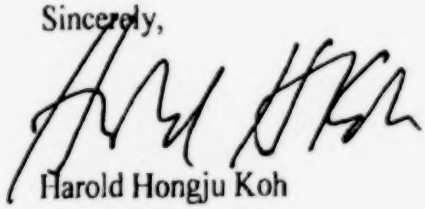

Harold Hongju Koh
Legal Adviser

Attachments as stated.

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 1, 2011

Ms. Rissie Owens
Presiding Officer
Texas Board of Pardons and Paroles
1300 11th Street, Suite 520
Huntsville, Texas 77340-0599

Re: *In re Humberto Leal Garcia*

Dear Ms. Owens:

I write you urgently regarding the case of Humberto Leal Garcia, a Mexican national scheduled to be executed in Texas on July 7, 2011. Specifically, I ask for you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal's execution date to afford a reasonable time for Congress to enact pending legislation that would avoid an international law violation in this case.

In *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (*Avena*), the International Court of Justice (ICJ) found that Mr. Leal had been convicted and sentenced to death without being informed that he could seek the assistance of the Mexican consulate, in violation of the United States' obligations under the Vienna Convention on Consular Relations. His execution on July 7 would violate the United States' obligations under the ICJ judgment, which required the United States to provide judicial "review and reconsideration" to determine whether Leal's conviction or sentence was actually prejudiced by the consular violation.

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Sincerely,

Harold Hongju Koh
Legal Adviser

Attachments as stated

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 1, 2011

The Honorable Susan D. Reed
District Attorney, Bexar County
Bexar County Justice Center
300 Dolorosa, Fifth Floor
San Antonio, Texas 78205-3030

Re: *In re Humberto Leal Garcia*

Dear District Attorney Reed:

I write you urgently regarding the case of Humberto Leal Garcia, a Mexican national scheduled to be executed in Texas on July 7, 2011. Specifically, I ask for you to make all available efforts under Texas law to secure a continuance or modification of Mr. Leal's execution date to afford a reasonable time for Congress to enact pending legislation that would avoid an international law violation in this case.

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Sincerely,

Harold Hongju Koh
Legal Adviser

Attachments as stated